

NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals	v
Superior Court Judges	vii
District Court Judges	xi
Attorney General	xvii
District Attorneys	xix
Public Defenders	xx
Table of Cases Reported	xxi
Table of Cases Reported Without Published Opinions	xxv
General Statutes Cited and Construed	xxxix
Rules of Evidence Cited and Construed	xxxiv
Rules of Civil Procedure Cited and Construed	xxxiv
Constitution of North Carolina Cited and Construed	xxxiv
Rules of Appellate Procedure Cited and Construed	xxxiv
Opinions of the Court of Appeals	1-790
Order Adopting Amendment to General Rules of Practice for the Superior and District Courts	793
Analytical Index	797
Word and Phrase Index	830

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-
1. Appointed and sworn in 28 February 1997.
 2. Appointed and sworn in 14 March 1997.

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CASES REPORTED

	PAGE		PAGE
Abbott Laboratories, Hyde v.	572	Byers v. N.C. Savings Institutions Division	689
Act-Up Triangle v. Commission for Health Services	256	Byrd v. Raleigh Golf Assn.	272
Adams v. Kelly Springfield Tire Co.	681	Caldwell County Bd. of Educ., Barringer v.	373
Allen v. Efird	701	Carlson v. Branch Banking and Trust Co.	306
American National Can Corp., Weaver v.	507	Carolina Cable & Connector v. R&E Electronics, Inc.	519
Anderson v. Hollifield	426	Carter v. Northern Telecom	547
Appeal of Camel City Laundry Co., In re	210	Carter v. Stanly County	235
Appeal of Parsons, In re	32	Cartner v. Nationwide Mutual Fire Ins. Co.	251
Arrington v. Texfi Industries	476	Castleberry, Daughtry v.	671
Artis, State v.	114	Chance, Owens v.	523
Austin Co. of Greensboro, Seagroves v.	228	Charlotte Housing Authority v. Fleming	511
Avery County, Town of Spruce Pine v.	704	CHC Durham Corp., Richland Run Homeowners Assn. v.	345
B. V. Hedrick Gravel & Sand Co., Southerland v.	120	City of Charlotte, Lucas v.	140
Backyard Burgers of Asheville, Jennings v.	129	City of Durham, Williams v.	595
Baker v. Becan	551	Commission for Health Services, Act-Up Triangle v.	256
Ballenger, State v.	179	Conner v. Continental Industrial Chemicals	70
Barnes, State v.	144	Continental Industrial Chemicals, Conner v.	70
Barringer v. Caldwell County Bd. of Educ.	373	Continental Ins. Co., Martin v.	650
Bd. of Trustees, State Employees' Ret. Sys., Wiebenson v.	246	Cottle v. Thompson	147
BDO Seidman, Liberty Finance Co. v.	515	Craft v. Bill Clark Construction Co.	777
Becan, Baker v.	551	Creason, State v.	495
Beck v. Beck	629	Creed v. R. G. Swaim and Son, Inc.	124
Becks, Hartford Underwriters Ins. Co. v.	489	Cross v. Residential Support Services	616
Bill Clark Construction Co., Craft v.	777	Crouse v. Flowers Baking Co.	555
Blue Cross and Blue Shield of North Carolina, Freeman v.	260	Daughtry v. Castleberry	671
Boger v. Gattton	635	Davidson, State v.	326
Boise Cascade Corp., Setzer v.	441	Davis, State v.	240
Branch Banking and Trust Co., Carlson v.	306	Davis, Guilford County ex rel. Gardner v.	527
Britt v. Jones	108	Denning-Boyles v. WCES, Inc.	409
Brooks, Miller v.	20	Doe, Powell v.	392
Broyhill Furniture Industries, Franklin v.	200	Drew, Sotelo v.	464
Burton v. Burton	153	Eason, Smallwood v.	661
		Efird, Allen v.	701

CASES REPORTED

	PAGE		PAGE
Enzor v. Minton	268	In re Estate of Morris	264
Enzor v. N.C. Farm Bureau		In re Foreclosure of	
Mut. Ins. Co.	544	Aal-Anubiaimhotepokorohamz ..	133
Erixon, Parker v.	383	In re Foreclosure of	
Estate of Morris, In re	264	C and M Investments	52
Evans v. Young-Hinkle Corp.	693	In re Jurga	91
Fleming, Charlotte		In re Oghenekevebe	434
Housing Authority v.	511	Integon Indemnity Corp.,	
Fletcher v. Fletcher	744	Nationwide Mutual Ins. Co. v. ...	536
Flowers Baking Co., Crouse v.	555	J. M. Smith Corp. v. Matthews	771
Foreclosure of		Jennings v. Backyard	
Aal-Anubiaimhotepokorohamz,		Burgers of Asheville	129
In re.	133	Johnson v. Jones Group, Inc.	219
Foreclosure of C and M		Johnston, State v.	292
Investments, In re	52	Jones, Britt v.	108
Fowler, Hayes v.	400	Jones Group, Inc., Johnson v.	219
Franklin v. Broyhill		Jurga, In re	91
Furniture Industries	200	Justice v. Justice	733
Freeman v. Blue Cross and		Kaplan v. Prolife Action	
Blue Shield of North Carolina ..	260	League of Greensboro	677
Gatton, Boger v.	635	Kaplan v. Prolife Action	
Giles, Long v.	150	League of Greensboro	720
Greenman v. Pony Express	136	Keiltex Industries, Inc., Sykes v. ...	482
Guilford County ex rel.		Kelly v. Otte	585
Gardner v. Davis	527	Kelly Springfield Tire Co.,	
Hairston, State v.	753	Adams v.	681
Harley Davidson of Metrolina,		Kirkpatrick, State v.	86
Radzisz v.	602	Klein, MacLagan v.	557
Harrelson, Outdoor East v.	685	L & L Construction,	
Hartford Underwriters Ins.		Inc., Moseley v.	79
Co. v. Becks	489	Liberty Finance Co. v.	
Hayes v. Fowler	400	BDO Seidman	515
Hieb v. Howell's Child		Long v. Giles	150
Care Center	61	Lucas v. City of Charlotte	140
Hinson v. United Financial		MacLagan v. Klein	557
Services	469	Manley v. Parker	540
Hollifield, Anderson v.	426	Markham & Associates,	
Howell's Child Care		Patterson v.	448
Center, Hieb v.	61	Martin v. Continental Ins. Co.	650
Hudson, State v.	336	Matthews, J. M. Smith Corp. v.	771
Hunt, State v.	762	Midway Grading Co. v.	
Hurley v. Hurley	781	N.C. Dept. of E.H.N.R.	501
Hyde v. Abbott Laboratories	572	Miller v. Brooks	20
In re Appeal of Camel		Minton, Enzor v.	268
City Laundry Co.	210	Misenheimer, State v.	156
In re Appeal of Parsons	32	Moore v. Sullivan	647

CASES REPORTED

	PAGE		PAGE
Moseley v. L & L		Public Staff, State ex rel.	
Construction, Inc.	79	Utilities Comm. v.	623
Murray v. Nationwide		Public Staff, State ex rel.	
Mutual Ins. Co.	1	Utilities Comm. v.	43
Myers, State v.	189		
National Council on		Radzisz v. Harley Davidson	
Compensation Ins.,		of Metrolina	602
N.C. Steel v.	163	Rahim v. Truck Air	
Nationwide Mutual Fire		of the Carolinas	609
Ins. Co., Cartner v.	251	Raleigh Golf Assn., Byrd v.	272
Nationwide Mutual Ins.		R&E Electronics, Inc.,	
Co., v. Integon		Carolina Cable &	
Indemnity Corp.	536	Connector v.	519
Nationwide Mutual Ins.		Residential Support Services,	
Co., Murray v.	1	Cross v.	616
Nationwide Mutual Ins.		R. G. Swaim and Son,	
Co., v. Williams	103	Inc., Creed v.	124
N.C. Dept. of E.H.N.R.,		Richland Run Homeowners	
Midway Grading Co. v.	501	Assn. v. CHC Durham Corp.	345
N.C. Dept. of Transportation,		Risk and Ins. Brokerage Corp.,	
Timmons v.	456	Stanley & Associates v.	532
N. C. Farm Bureau Federation,			
William C. Vick		Seagroves v. Austin Co.	
Construction Co. v.	97	of Greensboro	228
N.C. Farm Bureau Mut.		Setzer v. Boise Cascade Corp.	441
Ins. Co., Enzor v.	544	Shively, Walker Frames v.	643
N.C. Savings Institutions		Sisk, State v.	361
Division, Byers v.	689	Smallwood v. Eason	661
N.C. Steel v. National Council		Sotelo v. Drew	464
on Compensation Ins.	163	Southerland v. B. V. Hedrick	
Northern Telecom, Carter v.	547	Gravel & Sand Co.	120
Oghenekevebe, In re	434	St. Paul Mutual Ins.	
Onslow County v. Phillips	317	Co., Vasseur v.	418
Otte, Kelly v.	585	Stanley & Associates v.	
Outdoor East v. Harrelson	685	Risk and Ins. Brokerage Corp. ..	532
Owens v. Chance	523	Stanly County, Carter v.	235
Parker v. Erixon	383	State v. Artis	114
Parker, Manley v.	540	State v. Ballenger	179
Patterson v. Markham		State v. Barnes	144
& Associates	448	State v. Creason	495
Phillips, Onslow County v.	317	State v. Davidson	326
Pony Express, Greenman v.	136	State v. Davis	240
Powell v. Doe	392	State v. Hairston	753
Prolife Action League		State v. Hudson	336
of Greensboro, Kaplan v.	677	State v. Hunt	762
Prolife Action League		State v. Johnston	292
of Greensboro, Kaplan v.	720	State v. Kirkpatrick	86
		State v. Misenheimer	156
		State v. Myers	189

CASES REPORTED

	PAGE		PAGE
State v. Sisk	361	United Financial Services,	
State v. Talbot	698	Hinson v.	469
State v. Truesdale	639	Vasseur v. St. Paul	
State v. Weaver	276	Mutual Ins. Co.	418
State ex rel. Utilities Comm.		Walker Frames v. Shively	643
v. Public Staff	43	WCES, Inc., Denning-Boyles v.	409
State ex rel. Utilities Comm. v.		Weaver v. American	
Public Staff	623	National Can Corp.	507
Sullivan, Moore v.	647	Weaver, State v.	276
Sykes v. Keiltex Industries, Inc.	482	Wiebenson v. Bd. of	
Talbot, State v.	698	Trustees, State Employees'	
Texfi Industries, Arrington v.	476	Ret. Sys.	246
Thompson, Cottle v.	147	William C. Vick Construction	
Timmons v. N.C. Dept.		Co. v. N. C. Farm Bureau	
of Transportation	456	Federation	97
Town of Spruce Pine v.		Williams v. City of Durham	595
Avery County	704	Williams, Nationwide	
Truck Air of the Carolinas,		Mutual Ins. Co. v.	103
Rahim v.	609	Young-Hinkle Corp., Evans v.	693
Truesdale, State v.	639		

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
Adams, State v.	357	Boddie, State v.	788
Aetna Casualty & Surety Co., Carter v.	159	Booker v. Metropolitan Sewerage Dist.	356
Aetna Casualty & Surety Co. v. Prestige Fabricators	787	Booth v. Booth	159
Aiken v. N.C. Dept. of Correction	356	Boxley, State v.	354
Alexander, State v.	357	Boyd v. Prevette	159
Allen, State	161	Boyles v. Safrit	356
Allen, Housing Authority of City of Raleigh v.	356	Brenner v. Maier	356
Allen, State v.	357	Brewer, State v.	354
Allen, State v.	358	Brinson, State v.	161
Allison, State v.	161	Britt, Muse v.	357
Alpiser v. Andrew	787	Brown, Crissman v.	787
Armon, State v.	785	Brown v. Robinson	159
Andco Industries, Riley v.	161	Bryant, State v.	161
Andrew, Alpiser v.	787	Bryson v. Phil Cline Trucking	787
Angel v. N.C. Dept. of Transportation	784	Burch, State v.	785
Aratex Services, Terry v.	789	Burton v. Southern Ice Co.	159
Armstrong, State v.	785	Bush, State v.	161
Arnold, State v.	358	Butler, State v.	785
Arrington v. Perdue Farms	159	Campbell v. City of Winston-Salem	356
Artis and Owens, State v.	358	Campbell v. Eatman's, Inc.	356
Atlantic American Properties, Williford v.	360	Campbell, Neally v.	788
Baldelli, Colvill v.	356	Canady v. Hayes	356
Banner, State v.	354	Car Company International, Rivera v.	354
Bd. of Adjust. of Town of Lake Lure, McNeil v.	357	Carrera Assoc. v. Stern	159
Beeh v. Milligan	784	Carter v. Aetna Casualty & Surety Co.	159
Bell v. Hardy	784	Casey v. Blythe Construction, Inc.	787
Bell v. Hardy	784	Cherry, State v.	161
Berry, State v.	358	Chisholm, State v.	789
Bertie Citizens v. N.C. Dept. of E.H.N.R.	159	Cieszko Construction Co. v. Pierce	787
Beverly Enterprises, Mayfield v.	160	City of Charlotte, King v.	357
Biggins v. Blount	159	City of Raleigh, Myles v.	784
Bishop v. Memorial Mission Hospital	784	City of Winston-Salem, Campbell v.	356
Black, State v.	358	C & J Broadcasting, Waters	162
Blevins, State v.	161	Clark v. Clark	787
Blizzard v. Hickory Vinyl Corp.	159	Coley v. Taylor	784
Blount, Biggins v.	159	Colombo, MacKenzie v.	160
Blythe Construction, Inc., Casey v.	787	Colvill v. Baldelli	356
		Community Service of the Carolina's v. Freeman	789
		Concord, Hartsoe v.	160
		Coston, State v.	354

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
Cottrell, Housing Auth. of Winston-Salem v.	788	Frizzell v. Smith Drayline & Storage	356
County of Davidson, Hartwell v. . . .	788	Gill, State v.	788
Creasman v. N.C. Bd. of Pharmacy	159	Godfrey, State v.	355
Crissman v. Brown	787	Graves, State v.	358
Dana v. Kass	159	Gray, State v.	786
Dansey v. Evans	787	Greenhill, State v.	786
Davis v. Davis	160	Guilford County, Tellekamp v.	360
Davis, State v.	358	Gunter v. Kirkland	354
Daye, State v.	785	H & M Diversified Investments v. Dickerson Realty Corp.	784
Dennis, In re	357	Hall, State v.	358
Dept. of Human Resources, Professional Nursing Services v.	785	Hall, State v.	788
Dept. of Trans. v. Isom	356	Hammond, State v.	790
Dickerson Realty Corp., H & M Diversified Investments v.	784	Hammonds, State v.	161
Dill, State v.	355	Hanford's, Inc. v. Hoyes	788
Doe, Noonkester v.	784	Hardy, Bell v.	784
Dorsey, State v.	161	Hardy, Bell v.	784
Duran, State v.	358	Hargrave v. Tesh	160
Durham Bd. of Ed., Walker v.	790	Harrelson Ford, Linker v.	354
Eatman's, Inc., Campbell v.	356	Harris, State v.	790
Eckerd, Smith v.	785	Harris, Tuttle v.	787
Edmonds, State v.	358	Hartsoe v. Concord	160
Ely, First Union Nat. Bank v.	788	Hartwell v. County of Davidson . . .	788
Esau, Nix v.	161	Hatley v. K-Mart Corp.	356
Estate of Stewart, In re.	789	Hawkins v. Kane	784
Evans, Dansey v.	787	Hayes, Canady v.	356
Evans, State v.	358	Hayes v. Wrenn Handling, Inc. . . .	789
Evans, State v.	355	Hemingway, State v.	355
Everhart, State v.	358	Hermes, State v.	358
Feith, Thrasher v.	360	Hickory Vinyl Corp., Blizzard v. . .	159
Ferguson v. Ithaca Industries	787	Hidden Valley Trans., Woods v. . . .	360
Fernandez, State v.	785	Hogan v. Thomas	784
Ferree, Martin v.	357	Hollifield, State v.	786
Fewell, State v.	785	Holloman, State v.	786
First Union Nat. Bank v. Ely	788	Housing Auth. of City of Raleigh v. Allen	356
Flad, In re	788	Housing Auth. of Winston- Salem v. Cottrell	788
Floyd, N.C. Farm Bureau Mut. Ins. Co. v.	354	Hoyes, Hanford's, Inc. v.	788
FMC Corp., Smith v.	357	Hunter, State v.	358
Fowler, State v.	786	In re Dennis	357
Freeman, Community Service of the Carolina's v.	789	In re Estate of Stewart	789
		In re Flad	788
		In re McMillians	354
		In re Moore	784
		In re Rosser	160

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
In re South	160	Maier, Brenner v.	356
In re Story	160	Mallard, State v.	355
In re Weyerhaeuser	784	Manning v. Packaging Corp.	160
Isom, Dept. of Trans. v.	356	Martin v. Ferree	357
Ithaca Industries, Ferguson v.	787	Martin, State v.	359
James, Wake County v.	787	Mash, State v.	162
JDL Enterprises, U. S. Fidelity & Guar. Co. v.	360	Mastrom, Young v.	162
Jefferies, State v.	355	May v. Xpertel, Inc.	789
J. I. Case Credit Corp. v. York	160	Mayfield v. Beverly Enterprises	160
Johnson, State v.	355	Mayo v. N.C. State Hearing Aid Dealers Bd.	160
Johnson, State v.	786	McCandies v. McCandies	160
Johnson, State v.	790	McCotter, State v.	359
Jones, State v.	355	McDowell, State v.	359
Jones v. Jones	788	McGarity, Neese v.	160
Kane, Hawkins v.	784	McKendall, State v.	786
Kass, Dana v.	159	McMahon, State v.	786
Kate v. Kate	357	McMillians, In re	354
Kawasaki Motors Corp., Mooring v.	160	McNeil v. Bd. of Adjust. of Town of Lake Lure	357
Keaton, State v.	161	Memorial Mission Hospital, Bishop v.	784
Keeter, Unity Bank & Trust Co. v.	787	Metropolitan Sewerage Dist., Booker v.	356
Killens, Schwab v.	788	Milligan, Beeh v.	784
King v. City of Charlotte	357	Mills Mfg. Corp., Lee v.	357
King, State v.	788	Moody, State v.	162
Kirk, State v.	355	Moore, In re	784
Kirkland, Gunter v.	354	Mooring v. Kawasaki Motors Corp.	160
Kiser, Rhoney v.	357	Morehouse, Shaw Food Services v.	785
K-Mart Corp., Hatley v.	356	Morgan, State v.	359
Lambert, State v.	358	Morgan, State v.	786
Lane, State v.	162	Mosley v. TRW, Inc.	789
Lane Co., Oliver v.	354	Murph, State v.	786
Langley, State v.	359	Muse v. Britt	357
Leahy v. N.C. Bd. of Nursing	354	Myles v. City of Raleigh	784
Lee v. Mills Mfg. Corp.	357	Nance v. Nance	788
Lee, State v.	790	NationsBank v. White- Huff Mfg. Co.	784
Lilley, Paramore v.	784	N.C. Bd. of Nursing, Leahy v.	354
Linker v. Harrelson Ford	354	N.C. Bd. of Pharmacy, Creasman v.	159
Little v. Little	357	N.C. Dept. of Correction, Aiken v.	356
Long, State v.	790	N.C. Dept. of E.H.N.R., Bertie Citizens v.	159
Lowder, State v.	786		
Lowery, State v.	790		
Loy v. Loy	788		
MacKenzie v. Colombo	160		
Magnuson, State v.	790		

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
N.C. Dept. of Transportation,		Richardson, State v.	790
Angel v.	784	Riley v. Andco Industries	161
N.C. Farm Bureau Mut.		Rivera v. Car Company	
Ins. Co. v. Floyd	354	International	354
N.C. Mobile Home		Robinson, Brown v.	159
Corp., Reid v.	354	Rogers, State v.	359
N.C. State Bd. of Ed., Sciullo v.	788	Rogers, State v.	359
N.C. State Hearing Aid		Roser v. Roser	785
Dealers Bd., Mayo v.	160	Rosser, In re	160
Neally v. Campbell Soup Co.	788	Russos v. Wheaton Industries	354
Neese v. McGarity	160		
Nickerson, State v.	788	Safrit, Boyles v.	356
Nix v. Esau	161	Sanders v. Sanders	785
Noonkester v. Doe	784	Saunders, State v.	786
		Schwab v. Killens	788
Oliver v. Lane Co.	354	Sciullo v. N.C. State Bd. of Ed.	788
Oliver, State v.	789	Self, State v.	789
Packaging Corp., Manning v.	160	Seufert v. Seven Lakes	
Paramore v. Lilley	784	Development Co.	161
Parker, State v.	359	Seven Lakes Development	
Payne, State v.	786	Co., Seufert v.	161
Pearson, State v.	359	Sewell, State v.	359
Penn, State v.	355	Shanley, State v.	360
Perdue Farms, Arrington v.	159	Shaw Food Services	
Petty, State v.	355	v. Morehouse	785
Phil Cline Trucking, Bryson v.	787	Shepard, State v.	356
Phillips v. Phillips	161	Simonson, State v.	162
Phipps v. Town of Turkey	354	Smith v. Eckerd	785
Pierce, Cieszko		Smith v. FMC Corp.	357
Construction Co. v.	787	Smith, Town of	
Powers, State v.	355	Kill Devil Hills v.	790
Prestige Fabricators,		Smith, State v.	162
Aetna Casualty &		Smith, State v.	162
Surety Co. v.	787	Smith, State v.	789
Prevette, Boyd v.	159	Smith, State v.	790
Priester, State v.	786	Smith, State v.	790
Professional Nursing Services		Smith Drayline & Storage,	
v. Dept. of Human Resources	785	Frizsell v.	356
Prudhomme, State v.	786	Snead, State v.	360
		South, In re	160
Quick, State v.	355	Southard, State v.	790
		Southern Ice Co., Burton v.	159
Ralden v. Vienne	785	State v. Adams	357
Ransom, State v.	359	State v. Alexander	357
Ransome, State v.	359	State v. Allen	161
Reece, State v.	355	State v. Allen	357
Reid v. N.C. Mobile		State v. Allen	358
Home Corp.	354	State v. Allison	161
Rhoney v. Kiser	357	State v. Amon	785

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
State v. Armstrong	785	State v. Jones	355
State v. Arnold	358	State v. Keaton	161
State v. Artis and Owens	358	State v. King	788
State v. Banner	354	State v. Kirk	355
State v. Berry	358	State v. Lambert	358
State v. Black	358	State v. Lane	162
State v. Blevins	161	State v. Langley	359
State v. Boddie	788	State v. Lee	790
State v. Boxley	354	State v. Long	790
State v. Brewer	354	State v. Lowder	786
State v. Brinson	161	State v. Lowery	790
State v. Bryant	161	State v. Magnuson	790
State v. Burch	785	State v. Mallard	355
State v. Bush	161	State v. Martin	359
State v. Butler	785	State v. Mash	162
State v. Cherry	161	State v. McCotter	359
State v. Chisholm	789	State v. McDowell	359
State v. Coston	354	State v. McKendall	786
State v. Davis	358	State v. McMahon	786
State v. Daye	785	State v. Moody	162
State v. Dill	355	State v. Morgan	359
State v. Dorsey	161	State v. Morgan	786
State v. Duran	358	State v. Murph	786
State v. Edmonds	358	State v. Nickerson	788
State v. Evans	355	State v. Oliver	789
State v. Evans	358	State v. Parker	359
State v. Everhart	358	State v. Payne	786
State v. Fernandez	785	State v. Pearson	359
State v. Fewell	785	State v. Penn	355
State v. Fowler	786	State v. Petty	355
State v. Gill	788	State v. Powers	355
State v. Godfrey	355	State v. Priestler	786
State v. Graves	358	State v. Prudhomme	786
State v. Gray	786	State v. Quick	355
State v. Greenhill	786	State v. Ransom	359
State v. Hall	358	State v. Ransome	359
State v. Hall	788	State v. Reece	355
State v. Hammond	790	State v. Richardson	790
State v. Hammonds	161	State v. Rogers	359
State v. Harris	790	State v. Rogers	359
State v. Hemingway	355	State v. Saunders	786
State v. Hermes	358	State v. Self	789
State v. Hollifield	786	State v. Sewell	359
State v. Holloman	786	State v. Shanley	360
State v. Hunter	358	State v. Shepard	356
State v. Jefferies	355	State v. Simonson	162
State v. Johnson	355	State v. Smith	162
State v. Johnson	786	State v. Smith	162
State v. Johnson	790	State v. Smith	789

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE		PAGE
State v. Smith	790	Tinnin, State v.	162
State v. Smith	790	Town of Kill Devil	
State v. Snead	360	Hills v. Smith	790
State v. Southard	790	Town of Turkey, Phipps v.	354
State v. Stepter	162	TRW, Inc., Mosley v.	789
State v. Stewart	789	Tuttle v. Harris	787
State v. Talford	360	Tyson, State v.	360
State v. Taylor	786	Tyson, State v.	789
State v. Templeton	360		
State v. Thomas	789	Unity Bank & Trust Co. v. Keeter . .	787
State v. Thompson	790	U. S. Fidelity & Guar. Co. v.	
State v. Thorpe	162	JDL Enterprises	360
State v. Tinnin	162		
State v. Tyson	789	Vienne, Ralden v.	785
State v. Tyson	360		
State v. Wesley	162	Wake County v. James	787
State v. Wilder	789	Walker v. Durham Bd. of Ed.	790
State v. Williams	360	Waters C & J Broadcasting	162
State v. Wilson	356	Wesley, State v.	162
State v. Woods	786	Weyerhaeuser, In re	784
State v. Wright	360	Wheaton Industries, Russos v. . . .	354
Stepter, State v.	162	White-Huff Mfg. Co.,	
Stern, Carrera Assoc. v.	159	NationsBank v.	784
Stewart, State v.	789	Whitt v. Whitt	787
Storey v. W. R. Grace Co.	789	Wilder, State v.	789
Story, In re	160	Williams, State v.	360
		Williford v. Atlantic American	
Talford, State v.	360	Properties	360
Taylor, Coley v.	784	Wilson, State v.	356
Taylor, State v.	786	Woods v. Hidden Valley Trans. . . .	360
Tellekamp v. Guilford County	360	Woods, State v.	786
Templeton, State v.	360	Wrenn Handling, Inc., Hayes v. . . .	789
Terry v. Aratex Services	789	W. R. Grace Co., Storey v.	789
Tesh, Hargrave v.	160	Wright, State v.	360
Thomas, Hogan v.	784		
Thomas, State v.	789	Xpertel, Inc., May v.	789
Thompson, State v.	790		
Thorpe, State v.	162	York, J. I. Case Credit Corp. v. . . .	160
Thrasher v. Feith	360	Young v. Mastrom	162

GENERAL STATUTES CITED AND CONSTRUED

G.S.

1-40	Enzor v. Minton, 268
1-52(1)	Hinson v. United Financial Services, 469
1-52(9)	Hinson v. United Financial Services, 469
1-75.10	Midway Grading Co. v. N.C. Dept. of E.H.N.R., 501
1A-1	See Rules of Civil Procedure, <i>infra</i>
1-567.13(a)(2)	William C. Vick Construction Co. v. N.C. Farm Bureau Federation, 97
7A-289.32(3)	In re Oghenekevebe, 434
8-53	State v. Sisk, 361
8C-1	See Rules of Evidence, <i>infra</i>
14-7.6	State v. Truesdale, 639
14-17.3	State v. Creason, 495
14-17.6	State v. Misenheimer, 156
14-39	State v. Weaver, 276
14-322(b)	State v. Talbot, 698
15A-910	State v. Sisk, 361
15A-926(b)(2)(a)	State v. Weaver, 276
15A-1214(h)	State v. Johnston, 292
15A-1340.14(d)	State v. Truesdale, 639
15A-1343(b1)(10)	State v. Johnston, 292
20-16.3A	State v. Barnes, 144
20-166	Powell v. Doe, 392
20-279.21(b)(4)	Hartford Underwriters Ins. Co. v. Becks, 489 Vasseur v. St. Paul Mutual Ins. Co., 418 Daughtry v. Castleberry, 671
24-2	Britt v. Jones, 108
29-19(b)	In re Estate of Morris, 264
29-19(c)	In re Estate of Morris, 264
47A-1 et seq.	Richland Run Homeowners Assn. v. CHC Durham Corp., 345
50-13.7	Kelly v. Otte, 585
50-13.10	Kelly v. Otte, 585

GENERAL STATUTES CITED AND CONSTRUED

G.S.

50A-3(1)	Beck v. Beck, 629
50A-14(a)	Beck v. Beck, 629
52-10.2	Fletcher v. Fletcher, 744
52A-30(a)	Kelly v. Otte, 585
55-6-01(c)	Byrd v. Raleigh Golf Assn., 272
58-2-75	N.C. Steel v. National Council on Compensation Ins., 272
58-3-1	Martin v. Continental Ins. Co., 650
58-63-15	Murray v. Nationwide Mutual Ins. Co., 1
58-63-15(11)	Murray v. Nationwide Mutual Ins. Co., 1
58-63-15(11)b	Murray v. Nationwide Mutual Ins. Co., 1
58-63-15(11)f	Murray v. Nationwide Mutual Ins. Co., 1
58-63-15(11)h	Murray v. Nationwide Mutual Ins. Co., 1
58-63-15(11)m	Murray v. Nationwide Mutual Ins. Co., 1
58-63-15(11)n	Murray v. Nationwide Mutual Ins. Co., 1
62-23	State ex rel. Utilities Comm. v. Public Staff, 623
75-1	N.C. Steel v. National Council on Compensation Ins., 272
75-1 et seq.	Hyde v. Abbott Laboratories, 572
75-1.1	Murray v. Nationwide Mutual Ins. Co., 1
75-16	Hyde v. Abbott Laboratories, 572
75-16.1	Britt v. Jones, 108
75A-10A	State v. Hudson, 336
75D-2(c)	Kaplan v. Prolife Action League of Greensboro, 720
75D-4	Kaplan v. Prolife Action League of Greensboro, 720
75D-8(c)	Kaplan v. Prolife Action League of Greensboro, 720
97-2(2)	Southerland v. B. V. Hedrick Gravel & Sand Co., 120
97-2(5)	Greenman v. Pony Express, 136
	Craft v. Bill Clark Construction Co., 777
97-10.2	Creed v. R. G. Swaim and Son, Inc., 124
97-10.2(e)	Anderson v. Hollifield, 426
97-10.2(f)	Radzisz v. Harley Davidson of Metrolina, 602

GENERAL STATUTES CITED AND CONSTRUED

G.S.

97-18(g)	Hieb v. Howell's Child Care Center, 61
97-19	Southerland v. B. V. Hedrick Gravel & Sand Co., 120
	Patterson v. Markham & Associates, 448
97-25	Johnson v. Jones Group, Inc., 219
	Franklin v. Broyhill Furniture Industries, 200
	Timmons v. N.C. Dept. of Transportation, 456
97-29	Franklin v. Broyhill Furniture Industries, 200
	Timmons v. N.C. Dept. of Transportation, 456
97-30	Franklin v. Broyhill Furniture Industries, 200
97-31	Franklin v. Broyhill Furniture Industries, 200
97-31(17)	Timmons v. N.C. Dept. of Transportation, 456
97-32	Seagroves v. Austin Co. of Greensboro, 228
97-80(c)	Timmons v. N.C. Dept. of Transportation, 456
97-88	Hieb v. Howell's Child Care Center, 61
	Timmons v. N.C. Dept. of Transportation, 456
97-88.1	Hieb v. Howell's Child Care Center, 61
	Evans v. Young-Hinkle Corp., 693
105-113.105 et seq.	State v. Ballenger, 179
105-287	In re Appeal of Camel City Laundry Co., 210
105-362(a)	Onslow County v. Phillips, 317
105-374(e)	Onslow County v. Phillips, 317
105-374(i)	Onslow County v. Phillips, 317
105-381	Onslow County v. Phillips, 317
113A-57(4)	Midway Grading Co. v. N.C. Dept. of E.H.N.R., 501
115C-325(e)(1)b	Barringer v. Caldwell County Bd. of Educ., 373
122C-152(a)	Cross v. Residential Support Services, 616
130A-101(f)	In re Estate of Morris, 264
135-1(10)	Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys., 246
143-214.5	Town of Spruce Pine v. Avery County, 704
143-214.6	Town of Spruce Pine v. Avery County, 704
143-215.6(a)	Town of Spruce Pine v. Avery County, 704
153A-435(a)	Cross v. Residential Support Services, 616

RULES OF EVIDENCE
CITED AND CONSTRUED

Rule No.	
404(b)	State v. Sisk, 361
609(b)	State v. Hunt, 762
803(6)	State v. Sisk, 361

RULES OF CIVIL PROCEDURE
CITED AND CONSTRUED

Rule No.	
5(d)	Cottle v. Thompson, 147
8(a)(2)	Cottle v. Thompson, 147
12	N.C. Steel v. National Council on Compensation Ins., 163
15	Sykes v. Keiltex Industries, Inc., 482
41(a)	Walker Frames v. Shively, 643
41(a)(1)	Baker v. Becan, 551
60(b)	Stoelo v. Drew, 464

CONSTITUTION OF NORTH CAROLINA
CITED AND CONSTRUED

Art. I, § 6	Town of Spruce Pine v. Avery County, 704
Art. II, § 1	Town of Spruce Pine v. Avery County, 704

RULES OF APPELLATE PROCEDURE
CITED AND CONSTRUED

Rule No.	
18(c)(3)	Crouse v. Flowers Baking Co., 555

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BENJAMIN FRANKLIN MURRAY, PLAINTIFF-APPELLANT, v. NATIONWIDE MUTUAL
INSURANCE COMPANY, STATE FARM INSURANCE COMPANY AND UNITED
STATES LIABILITY INSURANCE COMPANY, DEFENDANTS-APPELLEES

No. COA95-375

(Filed 2 July 1996)

1. Judgments § 62 (NCI4th)— ambiguous judgment—reference to pleadings and other proceedings

In an appeal from a summary judgment involving slow payment by insurance companies of a disputed judgment arising from an automobile accident where the summary judgment was apparently inconsistent but it was evident that none of the parties found it so, the Court of Appeals followed the assignments of error and the issues as briefed and argued by the parties. Under *Tucker v. Bank of Ashe*, 204 N.C. 120, when the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and other proceedings.

Am Jur 2d, Judgments §§ 93-97.

2. Trial § 78 (NCI4th)— summary judgment—verified allegations of complaint

Although defendant argued in an appeal from a summary judgment that plaintiff relied on the mere allegations of his pleadings, plaintiff properly verified his complaint and was en-

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

titled to have it considered as equivalent to a supporting or opposing affidavit.

Am Jur 2d, Summary Judgment §§ 18, 32 et seq.**3. Insurance § 1135 (NCI4th)— unpaid judgment—unfair trade practice—summary judgment**

The trial court erred by granting summary judgment on the issue of unfair trade practices for defendant Nationwide in an action arising from a car wreck where plaintiff obtained a judgment for damages which included prejudgment interest and eventually filed this action which included claims for breach of contract to pay an insurance claim and unfair and deceptive trade practices. The wording and facts alleged in plaintiff's cause of action number one, which the trial court allowed *in toto* and incorporated into the judgment, substantively align with the facts described in N.C.G.S. § 58-63-15(11)(b,f,h,m and n), and a violation of N.C.G.S. § 58-63-15 constitutes an unfair trade practice in violation of N.C.G.S. § 75-1.1 as a matter of law. Plaintiff's claims have at their heart breaches of insurance contracts by defendants; whether or not all of plaintiff's claims prove viable, some the existing judgments demonstrate damages for the delayed payment of interest due, costs assessed but not timely paid, and Nationwide's improper assertion of a med-pay credit. That relief would not have been due in the absence of damage to plaintiff and it is apparent that plaintiff has forecast actual and proximate injury.

Am Jur 2d, Insurance §§ 2012 et seq.**4. Insurance § 1135 (NCI4th)— unpaid judgment—unfair and deceptive practices—summary judgment**

Summary judgment for defendants was reversed as to State Farm and U.S. Liability for unfair and deceptive trade practices in an action which arose from an unpaid judgment arising from an automobile accident. The rule of *Wilson v. Wilson*, 121 N.C. App. 662, that a private right of action under N.C.G.S. § 58-63-15 and N.C.G.S. § 75-1.1 may not be asserted by a third-party claimant against the insurer of an adverse party when plaintiff is neither an insured nor in privity with the insurer is not applicable because this plaintiff is in contractual privity with State Farm and U.S. Liability and because the problems sought to be addressed by the *Wilson* court are not raised by the facts of this case. The facts

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

alleged and verified in these causes of action suffice to state a *prima facie* case for an N.C.G.S. § 58-63-15(11) violation in that the damages underlying plaintiff's claim for unfair trade practices are those which were allowed by the trial court, *i.e.*, the prejudgment and postjudgment interest and unpaid costs owed by defendants. The fact that defendants paid their share of interest and unpaid costs prior to judgment does not negate the possible existence of damages; plaintiff's alleged damages for unfair and deceptive trade practices (with regard to the nonpayment of interest and costs due) existed from the date of occurrence (the first date at which interest was due but not paid).

Am Jur 2d, Insurance §§ 2012 et seq.**5. Insurance § 1135 (NCI4th)— failure to pay judgment—tortious breach of contract—summary judgment**

The trial court erred by granting summary judgment for Nationwide on the issue of punitive damages based on tortious breach of contract. Upon review of the facts alleged in plaintiff's verified complaint and the judgment based on plaintiff's first cause of action, plaintiff has alleged and forecast a tortious act accompanied by some element of aggravation.

Am Jur 2d, Insurance §§ 2012 et seq.

Appeal by plaintiff from summary judgment filed 14 December 1994 by Judge Henry V. Barnette, Jr., in Durham County Superior Court. Heard in the Court of Appeals 11 January 1996.

Poe, Hoof, & Reinhardt, by G. Jona Poe, Jr., and Patrick W. Baker, for plaintiff appellant.

Bryant, Patterson, Covington & Idol, P.A., by Lee A. Patterson, II, for defendant appellee Nationwide.

Haywood, Denny & Miller, L.L.P., by George W. Miller, Jr., and John R. Kincaid, for defendant appellees State Farm Insurance Company and United States Liability Insurance Company.

SMITH, Judge.

The central issues on this appeal are whether the trial court properly granted summary judgment for all defendants with regard to plaintiff's claims of unfair and deceptive trade practices, and for defendant Nationwide on plaintiff's claim for punitive damages aris-

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

ing from Nationwide's alleged tortious breach of contract. Because plaintiff has presented evidence which establishes genuine issues of material fact on these claims, we reverse.

The genesis of this case is a car wreck which occurred on 16 January 1986 in Durham County, North Carolina. On that day plaintiff was driving an automobile behind Ricky Stephenson (Stephenson) on N.C. Highway 15. Stephenson made a sharp left turn, which caused an automobile in the oncoming lane to swerve in order to avoid collision with Stephenson. The car swerving to avoid collision was forced into the lane of plaintiff's travel, resulting in a head-on collision between that driver and plaintiff. The accident resulted in serious injury to plaintiff.

Plaintiff thereafter sued and in 1990 obtained a judgment (the "underlying judgment") against Stephenson for \$85,000.00, plus costs, prejudgment and postjudgment interest. Three different insurance companies and three different insurance policies were implicated by plaintiff's judgment. Stephenson was driving another person's car when the accident occurred. The car Stephenson was driving was insured by State Farm Insurance Company (State Farm) for damages up to \$25,000.00. Stephenson's personal automobile insurance was with United States Liability Insurance Company (U.S. Liability) for damages up to \$25,000.00. Finally, plaintiff maintained an underinsured motorist policy with Nationwide Mutual Insurance Company (Nationwide), which provided coverage up to \$100,000.00.

This Court affirmed the underlying judgment *sub nomine Murray v. McCall*, 103 N.C. App. 525, 407 S.E.2d 624 (1991). Petitions for discretionary review were twice denied by the N.C. Supreme Court, with final denial of review becoming effective in January of 1992. *Murray v. McCall*, 330 N.C. 119, 409 S.E.2d 597 (1991) and 330 N.C. 442, 412 S.E.2d 74 (1991). In February and March of 1992, respectively, State Farm and U.S. Liability paid their policy limits of \$25,000.00 each to the Durham County Clerk of Court to be applied against the outstanding judgment. At the time these amounts were paid by these two defendants, the underlying judgment was two years old. State Farm and U.S. Liability continued to refuse any payment of interest on the underlying judgment, asserting that, because Nationwide had insisted on appealing the judgment, they were relieved of further liability. This left a balance of \$35,000.00 outstanding on the principal due plaintiff per the judgment, not including interest and costs outstanding.

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

In March of 1992, Nationwide tendered a \$33,000.00 check to plaintiff, conditioned upon plaintiff releasing Nationwide from any further liability pursuant to the underlying judgment. The amount of the check was \$33,000.00, rather than \$35,000.00, because Nationwide claimed a \$2,000.00 credit for monies previously paid plaintiff for medical expenses (Nationwide's liability policy with plaintiff included a provision allowing for payment of a limited amount of medical expenses, hereinafter the "med-pay credit"). Plaintiff would not sign the release and disputed Nationwide's notion that med-pay credit was due for the previous payment of plaintiff's medical expenses.

In April 1992, Nationwide unconditionally paid \$33,000.00 to plaintiff, with plaintiff explicitly reserving future claims against Nationwide. At this point, Nationwide refused to pay any portion of the prejudgment or postjudgment interest (the interest) required by, and due on, the judgment. Nationwide continued to maintain that it was due a \$2,000.00 med-pay credit for medical advances already provided to plaintiff. Nationwide's position on the interest issue was that State Farm and U.S. Liability, as the "primary" insurance carriers involved, were solely liable for payment of interest owed.

Negotiations were undertaken by the parties regarding the interest issue and the med-pay credit. During this period, Nationwide told plaintiff that it intended to await, and then follow, the North Carolina Supreme Court's impending decision in *Baxley v. Nationwide*, 334 N.C. 1, 430 S.E.2d 895 (1993) (*Baxley II*), before paying either the accumulated interest, its share of costs, or the \$2,000.00 remaining on the judgment as a result of the claim for a med-pay credit.

The failure of the above negotiations led plaintiff to file the instant lawsuit. In July of 1992, plaintiff sued defendants for breach of contract for failure to pay an insurance claim without any just or reasonable cause in law or equity, unfair and deceptive trade practices, tortious breach of contract, and breach of the implied covenant of good faith and fair dealing. In their responsive pleadings in this case, made prior to the N.C. Supreme Court's decision in *Baxley II*, each defendant individually denied any financial obligation to plaintiff other than the judgment principal. As well, defendant Nationwide continued to assert its right to a med-pay credit against plaintiff's recovery, maintaining that this Court's decision in *Baxley v. Nationwide*, 104 N.C. App. 419, 410 S.E.2d 12 (1991) (*Baxley I*) controlled the issue. Nationwide continued to deny exposure for any of

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

the prejudgment or postjudgment interest due plaintiff, but maintained that this particular issue would also be decided by the *Baxley II* decision. Nationwide advised plaintiff that it intended to apply the rules established in *Baxley II* to the facts in this case on the med-pay and interest issues.

In the *Baxley II* decision (filed 2 July 1993), our Supreme Court reaffirmed the prior decision of the Court of Appeals in *Aills v. Nationwide Mut. Ins. Co.*, 88 N.C. App. 595, 363 S.E.2d 880 (1988). *Baxley II* established that Nationwide (as the UIM carrier) was not entitled, under the terms of its policy, to a med-pay credit for payments made under the medical payments section of the plaintiff's policy. *Baxley II*, 334 N.C. at 12-13, 430 S.E.2d at 902. The medical payment provisions of the policy at issue in *Baxley II* appear identical to those in the UIM policy involved in the instant case.

The *Baxley II* Court reasoned that, since the UIM section of Nationwide's policy obligated the payment of damages to an injured insured (who is legally entitled to recover), the conclusion naturally follows

that pre-judgment interest is an element of the insured's "damages," and that because Nationwide had agreed to pay "damages" up to its policy limit, Nationwide was liable for pre-judgment interest up to—but not in excess of—that limit as well.

George L. Simpson, III, *North Carolina: Uninsured and Underinsured Motorist Insurance, A Handbook* § 3:18, at 151 (1996); *Baxley II*, 334 N.C. at 11, 430 S.E.2d at 900. The relevant damages portion of the UIM policy in the instant case is identical to that under review in *Baxley II*.

Then, almost *five and a half months* after the *Baxley II* decision (15 December 1993), Nationwide tendered \$2,000.00 to plaintiff for the previously claimed med-pay credit. Nationwide's tender was premised nonetheless upon plaintiff agreeing to waive certain rights against Nationwide. This waiver was described by Nationwide as an "acknowledgment and release recognizing the acceptance of the [\$2,000.00] as payment in full of principal (emphasis added) of amounts due under the underinsured motorist coverage applicable to the case."

Plaintiff refused to accept the \$2,000.00 tender, due to the conditions attached to it by Nationwide. Plaintiff's refusal was based on his belief that Nationwide had "outstanding amounts due to him," which

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

would have been lost under the conditions presented by Nationwide. Finally, in *March of 1994* (approximately *eight* months after the *Baxley II* decision), Nationwide paid the \$2,000.00 amount in dispute to the Durham County Clerk of Court for application against the underlying judgment.

All defendants continued to deny liability for any share of the pre-judgment and postjudgment interest until 29 and 30 June 1994. On those dates, defendants each paid what they considered to be proportionate shares of interest and costs owed into the Durham County Clerk of Court. Whether those chosen allocations were proper, under the law and facts applicable to the instant case, is a matter which is not before us, and is an issue we do not resolve here.

Defendants' motion for summary judgment in the instant action was heard on 7 November 1994. After consideration of appropriate evidence from each side, the trial court granted partial summary judgment to plaintiff on his claim against Nationwide for breach of contract in refusing to pay plaintiff's claims against it without just or reasonable cause in law or equity (plaintiff's first cause of action). Further, summary judgment was granted plaintiff on his claims against State Farm and U.S. Liability for violating their duty to plaintiff as a third-party beneficiary of their liability insurance policies by refusing to pay plaintiff's claims for interest and costs without any just or reasonable cause in law or equity (plaintiff's fifth and sixth causes of action).

[1] Two preliminary issues must be given heed. First, the judgment appealed from appears to be inconsistent. Paragraph one, of the decree section of the 14 December 1994 summary judgment order, states that plaintiff prevailed on causes of action one, five and six. However, in paragraphs three and four of the same decree section, the trial judge granted summary judgment on counts five and six to State Farm and U.S. Liability. Needless to say, these two rulings cannot coexist.

Because the situation warrants it, we follow the rule from *Tucker v. Bank of Ashe*, 204 N.C. 120, 122, 167 S.E. 495, 496 (1933), to wit:

“Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms.' ”

Id. (citation omitted).

Even though the instant judgment appears inconsistent, it is evident that none of the parties found it so. Each party's statement of the case indicates that the following in fact occurred: The trial court granted summary judgment for all defendants on plaintiff's claims of unfair and deceptive trade practices, and for Nationwide on plaintiff's claim for punitive damages arising from Nationwide's alleged tortious breach of contract. Given the rule cited from *Tucker*, the apparent agreement among the parties as to whom was granted summary judgment for what, and the requirement that we view the evidence in the light most favorable to plaintiff, we follow the assignments of error, and the issues as briefed and argued by the parties. Thus, we now turn to plaintiff's assignments of error as they relate to the summary judgment granted defendants by the trial court below.

[2] As for the second preliminary matter, we note this Court's standard of review from a trial court's grant of summary judgment. A party will prevail on a motion for summary judgment only if the moving party (here, defendants) can show that no material facts are in dispute, and entitlement to judgment as a matter of law. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995). In addition, the record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom. *Id.* Evidence properly considered on a motion for summary judgment “includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.” *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

Defendants repeatedly argue that plaintiff “relies on allegations in his complaint (rather than any forecast of evidence),” and “is merely relying on the mere allegations of his pleadings.” In fact, defendants at various points in their briefs concede “that allegations similar to Appellant's may be sufficient to withstand summary judgment . . . [h]owever, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact”

Defendants have premised much of their argument upon the supposed failure of plaintiff to provide a viable forecast of evidence

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

establishing his claims. Defendants' assessment of plaintiff's forecast of evidence is simply incorrect. In plaintiff's complaint, he alleges specific facts based on personal knowledge. Moreover, "[his] pleading was verified in the manner prescribed by Rule 11(b), sworn to and subscribed before a notary public." *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972). Having properly verified his complaint, plaintiff is entitled to have it " 'considered as equivalent to a supporting or opposing affidavit, as the case may be.' " *Id.* (citation omitted).

Our review of defendants' grant of summary judgment will include all materials properly within the scope of this Court's purview. We now turn to the issues before us, which we will address *in seriatim*.

Unfair and Deceptive Trade Practices

[3] To prevail on a claim for unfair and deceptive trade practices, a claimant must demonstrate the existence of three factors: "(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business." *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542, *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1993); *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). The term "unfair" has been interpreted by our Courts as meaning a practice which offends established public policy, and which can be characterized by one or more of the following terms: "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Miller*, 112 N.C. App. at 301, 435 S.E.2d at 542.

We additionally observe that, if an insurance company engages in conduct manifesting an inequitable assertion of power or position, that conduct constitutes an unfair trade practice. *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991). People are insured because they wish to curb or eliminate risks to which they are exposed (or because law and public policy require it). *See Aills*, 88 N.C. App. at 597, 363 S.E.2d at 882 (underinsured motorist coverage is optional); *Engle v. State Farm Mut. Ins. Co.*, 37 N.C. App. 126, 132, 245 S.E.2d 532, 535 (automobile liability coverage is mandatory under North Carolina's Financial Responsibility Act, N.C. Gen. Stat. § 20-279.21), *disc. review denied*, 295 N.C. 645, 248 S.E.2d 250 (1978); *Nationwide v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977)

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

(“the Financial Responsibility Act . . . impose[s] liability upon an insurer as a matter of public policy”).

When the very event insured against occurs, the party shifting the risk must look to the insurer for recovery. In this situation, the heft of the insurer’s position, or bargaining power, is usually in direct proportion to the quantum lost by the insured party. In part due to this polarity of power between insurer and insured, this Court has held that “[e]vidence of negligence, good faith or lack of intent are not defenses to an action under G.S. § 75-1.1 [the statute providing for a cause of action for unfair and deceptive trade practices].” *Miller*, 112 N.C. App. at 301-02, 435 S.E.2d at 542; *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

Our courts have repeatedly defined the insurance business as affecting commerce, when an insurer provides insurance to a consumer purchasing a policy. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986). N.C. Gen. Stat. § 58-63-15(11) enumerates a list of practices which are, as a matter of law, instances of unfair and deceptive conduct. *Bentley v. N.C. Insurance Guaranty Assn.*, 107 N.C. App. 1, 15, 418 S.E.2d 705, 713 (1992). Violation of any form of conduct listed in § 58-63-15(11) operates as a *per se* instance of unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1. *Bentley*, 107 N.C. at 15, 418 S.E.2d at 713. In short, § 75-1.1 is a remedy “‘in the nature of a private action’” for the conduct described by and in § 58-63-15(11). *Miller*, 112 N.C. App. at 302, 435 S.E.2d at 542 (citation omitted).

I. Defendant Nationwide.

(Plaintiff’s Second and Third Causes of Action)

N.C. Gen. Stat. § 58-63-15(11) requires that its prohibited acts occur with “such frequency as to indicate a general business practice.” *Id.* The prohibited § 58-63-15(11) acts alleged by plaintiff include:

- b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

* * * *

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

- f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

* * * *

- h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

* * * *

- m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and
- n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

These allegations, along with the case-specific facts alleged and verified in the complaint, when viewed in the light most favorable to plaintiff, and when viewed against the composition of the judgments already rendered against defendants in this case, indicate plaintiff has made out his *prima facie* case of a § 58-63-15(11) violation.

The trial court granted summary judgment by ruling on, and adopting the language in, plaintiff's first cause of action against Nationwide. The substantive portion of this cause of action conforms to the acts referred to by § 58-63-15(11), in that it reads:

26. Plaintiff has made *numerous demands* upon Defendant Nationwide for the payment of his underinsured coverage pursuant to his policy with said Defendant.

27. Defendant Nationwide has, *without any just or reasonable cause, either in law or equity, refused to pay the claim of Plaintiff* for the amount which the Judgment against Mr. Stephenson exceeded the limits of his insurance coverage plus prejudgment and postjudgment interest and other costs and has therefore breached its contract with Plaintiff to provide underinsurance coverage as stated in Defendant Nationwide's policy of insurance.

(Emphasis added).

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

Given the wording and facts alleged in plaintiff's cause of action number one, which the trial court allowed *in toto* and incorporated into the judgment, we find the composition of the judgment substantively aligned with the acts described in § 58-63-15(11)(b, f, h, m and n). As such, this part of the judgment, in and of itself, attests to the unreasonableness of Nationwide's refusal to provide the prejudgment and postjudgment interest required by the underlying judgment. As well, cause of action number one, by its wording, demonstrates that numerous demands were made upon Nationwide for payment or settlement. Demands, such as those described by plaintiff, when made with the frequency alleged, are the type of "general business practice" contemplated by § 58-63-15(11). *Marshburn v. Associated Indemnity Corp.*, 84 N.C. App. 365, 374, 353 S.E.2d 123, 129, *disc. review denied*, 319 N.C. 673, 356 S.E.2d 779, and *reconsideration dismissed*, 320 N.C. 170, 358 S.E.2d 53 (1987); and *see Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 60, 370 S.E.2d 695, 698 (1988).

This Court has established that "[a] violation of G.S. § 58-63-15 constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1 as a matter of law." *Miller*, 112 N.C. App. at 302, 435 S.E.2d at 542. However, since § 58-63-15(11) is prescriptive, and does not constitute a cause of action in and of itself, the viability of plaintiff's § 75-1.1 claim requires him to forecast evidence of each requisite element of an unfair and deceptive trade practice. As we have determined *ante*, Nationwide's act of selling plaintiff a policy affects commerce, and its violation of § 58-63-15(11) constitutes an unfair act; therefore, all elements of an unfair and deceptive trade practice action have been forecast, except that pertaining to damages. *Miller*, 112 N.C. App. at 301, 435 S.E.2d at 542.

Defendants argue that because "[a]ll monies that Appellant claimed he was owed have either been paid directly to him or to the Clerk of Court on his behalf," plaintiff has suffered no damage. (A similar argument was advanced by the defendant in *Robinson v. N.C. Farm Bureau Ins. Co.*, 86 N.C. App. 44, 49, 356 S.E.2d 392, 395 (1987), *disc. review improvidently allowed*, 321 N.C. 592, 364 S.E.2d 140 (1988). However, that argument was summarily rejected by the *Robinson* Court.) The instant judgment indicates that plaintiff's claims in causes of action one, five, and six against defendants were "satisfied in full," prior to the rendering of the trial court's final ruling. Defendants argue that, since they have already paid the claims in dispute here, plaintiff has suffered no damages. This argument has no merit.

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

We reach this conclusion easily, because in the instant judgment—drawn from causes of action one, five, and six—defendants were merely paying damages owed pursuant to the underlying judgment, *i.e.*, interest and costs, and the med-pay credit. Defendants' damage exposure here arises from plaintiff's claims for punitive damages and treble damages for unfair and deceptive trade practices. Unquestionably, potential damages pursuant to these claims have not been paid.

Damages arise and flow from the event causing injury. Under our case law, an injury suffered may provide for both a cause of action sounding in common law (or as provided by statute), and simultaneously constitute conduct which is an unfair and deceptive trade practice. *Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131, *reh'g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990) ("defendants libeled Ellis Brokerage Company by impeaching it in its trade, thereby proximately causing it actual injury and damages"); and *see United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 486, 491, 403 S.E.2d 104, 106, 109, (company's breach of restrictive covenants also constituted an unfair trade practice), *disc. review allowed on other grounds*, 330 N.C. 123, 409 S.E.2d 610 (1991); and *decision aff'd by*, 335 N.C. 183, 437 S.E.2d 374 (1993). Plaintiff's claims in the instant matter for unfair and deceptive trade practices (and for tortious breach of contract) have, at their heart, breaches of the insurance contracts obligating payment to plaintiff by defendants. Whether or not all of plaintiff's claims in the instant suit prove viable, the existing judgments for causes of action one, five, and six (against Nationwide, State Farm, and U.S. Liability, respectively) demonstrate damages for the delayed payment of interest due, costs assessed but not timely paid, and Nationwide's improper assertion of a med-pay credit. That relief would not have been due in the absence of damage to plaintiff. We have previously held that

an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1, . . . will justify an *award of damages* under N.C.G.S. § 75-16 *for injuries* proximately caused. *See Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986). To recover, however, a plaintiff must have "suffered actual injury as a proximate result of defendant's [unfair or deceptive act]." *Pearce v. American Defender Life Ins. Co.*, 316 N.C. at 471, 343 S.E.2d at 180.

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

Ellis, 326 N.C. at 226, 388 S.E.2d at 131 (emphasis added). Thus, from the record before us, it is apparent plaintiff has forecast actual and proximate injury in his presentation of evidence.

As the above analysis demonstrates, there is evidence in the record indicating plaintiff has made out his *prima facie* case of unfair and deceptive trade practices against defendant Nationwide. We reverse the trial court's grant of summary judgment on this issue.

II. Defendants State Farm and U.S. Liability

(Plaintiff's Seventh Cause of Action)

[4] Against State Farm and U.S. Liability, plaintiff's claim for unfair and deceptive trade practices was based on alleged violations of § 58-63-15(11)(b, f, and n). Although the trial court granted summary judgment to defendants State Farm and U.S. Liability on plaintiff's unfair trade practice claim, it did grant summary judgment to plaintiff on his causes of action five and six. Causes of action five and six are virtually identical to each other, except for the named defendant listed in each. The fifth cause of action reads as follows:

Fifth Cause Of Action

39. Paragraphs 1 through 38 are hereby incorporated by reference as if fully set forth herein.

40. Plaintiff has made *numerous demands* upon Defendant State Farm for the payment of both prejudgment and postjudgment interest on the Judgment against Mr. Stephenson and for the payment of costs incurred by Plaintiff in the trial of said action against Mr. Stephenson.

41. Defendant State Farm has *without any just or reasonable cause, either in law or in equity, refused to pay the claim of Plaintiff* for interest and cost *in violation of its duty* to Plaintiff as a third-party beneficiary under the insurance policy providing coverage to Mr. Stephenson and *pursuant to N.C.G.S. § 20-279.21*.

(Emphasis added). Cause of action number six differs only in that it lists U.S. Liability, rather than State Farm, as the named defendant.

Analysis of the unfair and deceptive trade practice claims against these two defendants must begin with this Court's recent decision in *Wilson v. Wilson and Nationwide*, 121 N.C. App. 662, 468 S.E.2d 495 (1996). In *Wilson*, we established the rule that, when "plaintiff is nei-

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

ther an insured nor in privity with the insurer . . . a private right of action under N.C.G.S. § 58-63[-]15 and N.C.G.S. § 75-1.1 may not be asserted by a third-party claimant against the insurer of an adverse party.” *Id.* at 665, 468 S.E.2d at 497. The reasoning behind this rule is that “allowing such third-party suits against insurers would encourage unwarranted settlement demands, since plaintiffs would be able to threaten a claim for an alleged violation of N.C.G.S. § 58-63[-]15 in an attempt to extract a settlement offer.” *Id.* at 666, 468 S.E.2d at 498.

The *Wilson* rule is not applicable to defendants State Farm and U.S. Liability under the instant facts. The first reason for this conclusion is the existence of privity between the instant plaintiff and these defendants. One definition of privity is “a [d]erivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest.” Black’s Law Dictionary 1199 (6th ed. 1990). Our case law establishes that “ ‘[i]f the third party is an intended beneficiary, the law implies privity of contract.’ ” *Coastal Leasing Corp. v. O’Neal*, 103 N.C. App. 230, 236, 405 S.E.2d 208, 212 (1991) (quoting *Johnson v. Wall*, 38 N.C. App. 406, 410, 248 S.E.2d 571, 574 (1978)). As our Supreme Court emphasized in *Chantos*:

The victim’s rights against the [liability] insurer *are not derived through the insured*, as in the case of voluntary insurance [such as UIM coverage]. *Such rights are statutory and become absolute [as to the liability insurer] upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured’s car, regardless of whether or not the nature or circumstances of the injury are covered by the contractual terms of the policy.*

Chantos, 293 N.C. at 440-41, 238 S.E.2d at 604 (emphasis added) (interpreting N.C. Gen. Stat. § 20-279.21).

The injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party. *Lavender v. State Farm Mut. Auto. Ins. Co.*, 117 N.C. App. 135, 136, 450 S.E.2d 34, 35 (1994), *disc. review denied*, 339 N.C. 613, 454 S.E.2d 253 (1995); *LeCroy v. Nationwide Ins. Co.*, 251 N.C. 19, 20, 110 S.E.2d 463, 464 (1959); and *see* 13A Mark S. Rhodes, *Couch Cyclopedia of Insurance Law* § 49:101, § 49:103 (2d Revised Vol. 1982). Therefore, the instant plaintiff is in contractual privity with State Farm and U.S. Liability, and for this reason alone, is not bound by the third-party restrictions set forth in *Wilson*.

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

Outside the context of privity, it is equally distinguishing that the problems sought to be addressed by the *Wilson* Court are not raised by the facts in this case. The *Wilson* plaintiff's unfair and deceptive practice claim was based on the insurer's prejudgment behavior, whereas all of the conduct complained of here occurred after the underlying judgment was final. *Wilson* rests on this Court's policy concerns regarding possible pretrial litigation tactics between an injured party and the tortfeasor's insurance company acting as a party-defendant. *Wilson*, 121 N.C. App. at 666-67, 468 S.E.2d at 498. For instance, the *Wilson* Court wished to discourage "unwarranted settlement demands" by a plaintiff as a means to thereafter assert an unfair and deceptive practice claim. *Id.* at 666, 468 S.E.2d at 498. Further, the *Wilson* Court reasoned that "[a]llowing a third-party action because of a violation of N.C.G.S. § 58-63-15 . . . would likely put the insurer in a position of conflict with its insured—the party adverse to the third party." *Id.* at 667, 468 S.E.2d at 498. "The insurer has a duty to safeguard the interests of its insured," and should not interpose its interests to the detriment of its insured. *Id.*

In the instant case, none of the above-related policy concerns appear. This case was not in a pretrial posture on the underlying tort claim, when the unfair and deceptive trade practice allegations were made by plaintiff. Thus no *Wilson*-related pretrial safeguards were necessary here. And, as the defendant tortfeasor is not even a party to the current action, concerns over conflicts of interest do not exist in the context spoken to by *Wilson*.

The remainder of our analysis, on plaintiff's unfair and deceptive trade practice claims against State Farm and U.S. Liability, bears similarity to that applied earlier in this opinion against Nationwide. The trial court explicitly granted summary judgment for plaintiff on the grounds stated by plaintiff in causes of action five and six. Causes of action five and six demonstrate that "numerous demands" were made on State Farm and U.S. Liability, and that said demands were refused "without any just or reasonable cause, either in law or in equity." These unjust and unreasonable refusals, the trial court held, were in "violation of [the insurer's] duty to Plaintiff . . . and N.C.G.S. § 20-279.21."

By virtue of the grounds stated for the trial court's grant of summary judgment on these causes of action, the facts alleged and verified therein suffice to state a *prima facie* case for a § 58-63-15(11) violation. The damages underlying plaintiff's claim for unfair trade

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

practices are those which were allowed by the trial court, *i.e.*, the prejudgment and postjudgment interest and unpaid costs owed by defendants. The fact that defendants paid their share of this interest and unpaid costs prior to judgment does not negate the possible existence of damages. Plaintiff's alleged damages for unfair and deceptive trade practices (with regard to the nonpayment of interest and costs due) existed from the date of occurrence, which in this case, means the first date at which interest was due, but not paid in accordance with law. Given the trial court's ruling on causes of action five and six, interest became payable on the date the underlying judgment became final (absent a stay, or some other proper reason for delay). *See Baxley II*, 334 N.C. at 8-9, 430 S.E.2d at 901.

For the foregoing reasons, we find material facts in dispute, and conclude that plaintiff has made out his *prima facie* case for unfair and deceptive trade practices against State Farm and U.S. Liability. Summary judgment is thus reversed as to these issues.

Punitive Damages Based on Tortious Breach of Contract**I. Defendant Nationwide****(Plaintiff's Second and Fourth Causes of Action)**

[5] The remaining issue is whether the trial court erred by granting summary judgment to defendant Nationwide on the issue of punitive damages based on Nationwide's alleged tortious breach of contract. Defendant Nationwide, in its brief, acknowledges the following:

The North Carolina Court of Appeals has held that allegations *similar* to Appellant's may be sufficient to withstand summary judgment, provided a forecast of the evidence shows sufficient factual allegations of egregious conduct. In *Robinson v. N.C. Farm Bureau Insurance Company*, 86 N.C. App. 44, 356 S.E.2d 392 (1987), . . . a plaintiff alleged that an insurance company failed to affirm or deny coverage of claims within a reasonable amount of time after proof of loss statements had been completed, *did not attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability had become reasonably clear*, and attempted to settle a claim for less than the amount for which a reasonable man would have believed the plaintiff in that case was entitled. *Robinson*, 86 N.C. App. at 50.

(Emphasis added.)

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

After this description of the similarity between the instant plaintiff's allegations and *the Robinson* plaintiff's allegations, Nationwide, in its brief, adds:

In [the *Robinson*] case, however, the court noted the factual allegations that backed up the complaint In fact, Plaintiff asserts in the closing paragraph of Section II, subsection C, (Pl. brief, p. 26), that because he has "sufficiently alleged aggravated conduct" in his Complaint that summary judgment was improper. However, the plaintiff *may not rely upon the bare allegations of his complaint* to establish triable issues of fact

(Emphasis added). As we have noted earlier, defendant's assessment of the sufficiency of plaintiff's forecast of evidence is flawed. Plaintiff's complaint was verified, and that same complaint was the basis for the summary judgments granted plaintiff in causes of action one, five, and six.

Thus, we find ourselves in agreement with Nationwide that "allegations similar to Appellant's" are in accord with the requirements enumerated in *Robinson*. In *Robinson*, this Court "considered what evidence is sufficient to support a claim for tortious, bad faith refusal to settle a claim when the refusal to settle is *also* a breach of contract." *Robinson*, 86 N.C. App. at 49, 356 S.E.2d at 395. The *Robinson* Court established a nonexclusive list of tortious conduct, which, if accompanied by a breach of contract, would qualify a claim for punitive damages. *Id.* Broadly speaking, aggravating conduct must accompany the tort, but that aggravating conduct may take many forms. *Id.*

In its discussion of the various factors which might constitute aggravated conduct, the *Robinson* Court observed the unfair and deceptive acts described in § 58-63-15(11), and other factors such as "bad faith refusal to settle in a timely manner," and "no [legitimate] basis upon which to deny [the claim]." *Robinson*, 86 N.C. App. at 50, 356 S.E.2d at 396. In *Miller*, 112 N.C. App. at 305, 435 S.E.2d at 544, we stated that "[a] bad faith refusal to provide insurance coverage or to pay a justifiable claim may give rise to a claim for punitive damages."

Considering the forecast of evidence in the light most favorable to plaintiff, we again reference the judgment against Nationwide, which was based on plaintiff's first cause of action, in light of plaintiff's other verified allegations. The first cause of action describes Nationwide's conduct in refusing to pay the judgment principal

MURRAY v. NATIONWIDE MUTUAL INS. CO.

[123 N.C. App. 1 (1996)]

exceeding the limits of the primary carriers, prejudgment and post-judgment interest, and other trial court assessed costs. Plaintiff alleges, and the trial court agreed, that Nationwide's conduct was "without any just or reasonable cause." Plaintiff also alleges Nationwide's conduct was aggravated by "willful failure to pay a valid claim," and a "failure to attempt in good faith to effectuate prompt, fair and equitable settlement of this claim, [once] liability ha[d] become reasonably clear."

When considered altogether, we agree with Nationwide that plaintiff's claim closely resembles the factual situation in *Robinson*. In this case though, we also have the judgment based on plaintiff's first cause of action, which attests to the aggravating conduct of Nationwide. Thus, upon review of the facts alleged in plaintiff's verified complaint and the judgment based on plaintiff's first cause of action, we conclude plaintiff has alleged and forecast a tortious act accompanied by some element of aggravation. On this basis, the claimant is entitled to take his case of punitive damages to the jury, and summary judgment is reversed on this issue.

In summary, we reverse the trial court's judgment as to plaintiff's second, third, and fourth causes of action against Nationwide, and the seventh cause of action against U.S. Liability and State Farm. Plaintiff's second cause of action, alleging defendant Nationwide's breach of the covenant of good faith and fair dealing, is part and parcel of plaintiff's claims of unfair and deceptive trade practices and tortious breach of contract against defendant. Our Supreme Court has recognized that " '[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.' " *Bicycle Transit v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted). In addition to the attendant tortious breach of contract implications good faith involves, a lack of good faith and fair dealing by an insurance company squarely exposes that company to an unfair and deceptive practice claim. *Robinson*, 86 N.C. App. at 50-51, 356 S.E.2d at 395. Thus, we also reverse the trial court's grant of summary judgment for Nationwide on plaintiff's second cause of action, since the acts giving rise to this claim are integral to plaintiff's third and fourth causes of action.

On remand, and if necessary, plaintiff will be required to elect " 'to recover either punitive damages under [his] common law claim [tortious breach of contract] or treble damages under N.C.G.S.

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

§ 75-16, but [he] may not recover both.’ ” *Kuykendall*, 102 N.C. App. at 492, 403 S.E.2d at 110 (quoting *Ellis*, 326 N.C. at 227, 388 S.E.2d at 132). Also in this case, plaintiff has set forth a panoply of causes of action arising from the same injury. We emphasize that plaintiff may recover for an injury but once. *Barbee v. Atlantic Marine*, 115 N.C. App. 641, 650, 446 S.E.2d 117, 123 (1994). In *Barbee*, we commented:

[H]aving found that the defendant’s acts constituted an unfair and deceptive practice, [the trial court] properly trebled that amount and entered judgment thereon. However, by also entering judgment against [the defendant] on the [underlying claim of] breach of warranty claim, *which was based on the selfsame course of conduct, the court improperly allowed plaintiffs double recovery.*

Id. (emphasis added). We encourage the trial court to take care that this rule from *Barbee* is followed, should the necessity for its application arise on remand.

Reversed and remanded.

Judges JOHNSON and JOHN concur.

TERRY STUART MILLER, PLAINTIFF, v. GREGORY F. BROOKS, MICHAEL CRAIG HITE,
BROOKS INVESTIGATIONS, INC., ANNETTE K. MILLER AND PIERINO “PAT”
MASSARONI, DEFENDANTS

No. COA95-407

(Filed 2 July 1996)

**1. Privacy § 5 (NCI4th)— invasion of privacy by intrusion—
recognition in North Carolina**

Defendants’ acts of installing a hidden video camera in plaintiff’s bedroom and intercepting plaintiff’s mail as alleged and forecasted were sufficient to sustain plaintiff’s claims for invasion of privacy by intrusion on his seclusion, solitude, or private affairs; moreover, there was no merit to defendants’ assertion that the marital relationship between plaintiff and one defendant precluded plaintiff from asserting an intrusion claim, since, at the time of the intrusions, plaintiff and defendant were living sepa-

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

rately and had agreed that only plaintiff would live in the marital residence.

Am Jur 2d, Privacy §§ 91, 215-219.**2. Trespass § 46 (NCI4th)— trespass—summary judgment inappropriate**

The trial court erred in granting summary judgment to defendants on plaintiff's trespass claim where there was abundant record evidence showing that defendants on more than one occasion intentionally entered the house in question and that plaintiff had possession at that time, and there were genuine issues of material fact as to whether defendant wife had permission to enter her husband's house and to authorize others to do so, and as to whether defendants' entries exceeded the scope of any permission given; furthermore, plaintiff's marriage to defendant did not automatically preclude his action for trespass, nor did defendant establish that she was a tenant in common with plaintiff so as to give her a right of possession.

Am Jur 2d, Trespass §§ 215, 216.**3. Intentional Infliction of Mental Distress § 3 (NCI4th)— intentional infliction of emotional distress—summary judgment improper**

The trial court erred in granting summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress where a jury could reasonably find that the conduct of defendants in breaking into plaintiff's house and installing a hidden video camera was "extreme and outrageous conduct"; defendant wife knew and told the other defendants that plaintiff had a proclivity to be fearful; the record thus raised a genuine issue of fact as to whether they acted with reckless indifference to the likelihood that installation of the camera, once discovered, would cause plaintiff emotional distress; and a jury could reasonably conclude that the symptoms plaintiff suffered showed a severe and disabling emotional or mental condition.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 5-13.

Right to recover for emotional disturbance or its consequences, in the absence of impact or other actionable wrong. 64 ALR2d 100.

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

Modern status of intentional infliction of mental distress as independent tort; “outrage”. 38 ALR4th 998.

4. Trespass § 50 (NCI4th)— damages to real property incident to trespass—sufficiency of evidence

Plaintiff forecast sufficient proof to survive summary judgment on his prayer for damages to his real property incident to his trespass claim where such evidence tended to show that defendants damaged his house by altering the wiring and drilling holes in the ceiling, and plaintiff paid expenses for repairs and an electrician.

Am Jur 2d, Trespass § 175.

5. Privacy § 5 (NCI4th)— punitive damages—aggravated conduct—sufficiency of evidence

Plaintiff could properly seek punitive damages based on the intrusion tort upon proof of aggravated conduct, and the trial court erred in granting summary judgment on plaintiff's punitive damages claim, though defendants relied on the advice of counsel in ascertaining whether they had the right to enter the house, since evidence of aggravated conduct included the fact that defendants knew plaintiff had paranoid tendencies making him particularly susceptible to their intrusions; two of the defendants altered the wiring of plaintiff's house although neither was a licensed electrician; defendants placed a hidden camera in plaintiff's bedroom rather than in a less private area of the house; and defendants went back into the house even after they discovered that the camera had been removed.

Am Jur 2d, Privacy §§ 263-265.

Appeal by plaintiff from order entered 21 December 1994 by Judge W. Steven Allen in Guilford County Superior Court. Heard in the Court of Appeals 24 January 1996.

Gabriel Berry & Weston, L.L.P., by M. Douglas Berry, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Andrew A. Vanore and Beth Y. Smoot, for defendants-appellees Gregory F. Brooks, Michael Craig Hite, Brooks Investigations, Inc., and Pierino “Pat” Massaroni; Dotson & Kirkman, by John W. Kirkman, Jr., for defendant-appellee Annette K. Miller.

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

LEWIS, Judge.

Plaintiff appeals an order granting summary judgment to all defendants on all of his claims.

Evidence presented at the summary judgment hearing tends to show the following: In December 1986, plaintiff Terry Miller purchased a lot at 2400 Buck Lane. On 14 February 1987 he married defendant Annette K. Miller. The couple built a house on the Buck Lane lot and lived in it, but the property remained titled solely in plaintiff's name. On 1 August 1990, defendant Annette Miller moved out of the house and into an apartment. On 29 January 1991, the Millers entered into a separation agreement which provided that plaintiff Terry Miller had sole possession of the Buck Lane house. In February 1992, the couple attempted a reconciliation during which defendant Miller moved back into the Buck Lane residence. This reconciliation attempt failed and she moved out after a few days. Plaintiff has testified in his affidavit and in a previous criminal trial that the couple agreed that he would have exclusive possession and control of the Buck Lane house and that defendant Miller would not return unless she was invited or he was present. She returned her key.

In February 1993, defendant Annette Miller made arrangements with defendant Gregory Brooks, a private investigator with defendant Brooks Investigations, Inc., for a surveillance camera to be placed in the Buck Lane residence. Brooks hired defendants Massaroni and Hite to assist. On 5 February 1993, Brooks contacted a locksmith who met defendants Miller, Brooks, and Massaroni at the house and made a key to the house. On or about 16 or 17 February 1993, when plaintiff was not home, defendants Massaroni and Brooks entered the Buck Lane house, altered the wiring, and installed a hidden videotape camera in the bedroom ceiling.

On 17 February 1993, plaintiff returned home and discovered a pile of dust or dirt on the floor indicating that someone had been in his house. He engaged a private detective who helped him locate and remove the camera and videotape. They watched the videotape which showed pictures of plaintiff in his bedroom, getting undressed, taking a shower, and going to bed. The tape also showed defendants Brooks and Hite in plaintiff's bedroom. After discovering the camera, plaintiff became fearful for his life, moved out of his house temporarily, and carried a loaded shotgun in his car. He suspected he was being investigated by federal officials and went into hiding. Later, defendants

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

Miller, Massaroni, and Hite went to the house to change the videotape and discovered that the camera and tape had been removed.

In mid-February 1993, defendant Miller, representing herself as a resident, asked the local post office to hold the mail for 2400 Buck Lane. Afterwards, she regularly picked up plaintiff's mail at the post office, sorted through and discarded portions of it, and placed the remainder in plaintiff's mailbox. Defendant Massaroni picked up the mail for her once. Postal employees discovered that defendant Miller was not living at the Buck Lane house and contacted plaintiff.

Upon concluding that the defendants were involved, plaintiff filed this action on 27 July 1993 seeking a declaratory judgment and compensatory and punitive damages for invasion of privacy, intentional infliction of emotional distress, trespass, and damage to real property. On 7 April 1994, plaintiff amended his complaint adding defendant Massaroni and asserting additional claims for invasion of privacy. Defendants answered and moved to dismiss under N.C.R. Civ. P. 12(b)(6). Judge Allen heard defendants' motions to dismiss as motions for summary judgment and, on 21 December 1994, granted summary judgment to all defendants on all of plaintiff's claims.

Plaintiff has assigned error to the grant of summary judgment on his claims for invasion of privacy, trespass, damage to real property, intentional infliction of emotional distress, and a declaratory judgment. Since plaintiff has not presented argument on the dismissal of his declaratory judgment claim, this issue is abandoned on appeal. *See* N.C.R. App. P. 28(a) (1996).

Plaintiff alleges that defendants invaded his privacy by their intentional and highly offensive intrusion upon his seclusion, solitude, or private affairs. In his first and eighth causes of action, plaintiff asserts that defendants violated his privacy by breaking into his home, installing a hidden video camera in his bedroom, and taking pictures of him while in his bedroom. He asserts that they performed these acts wilfully, intentionally, maliciously, and in reckless disregard and indifference to his privacy rights. In his seventh cause of action, plaintiff asserts that defendants Miller, Massaroni, and Brooks Investigations, Inc., through its agent Massaroni, wilfully, intentionally, and maliciously invaded his privacy by intercepting and opening his mail without authorization.

[1] This appeal requires us to decide whether North Carolina recognizes the tort of invasion of privacy by intrusion into the seclusion, solitude, or private affairs of another ("intrusion tort").

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

In *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984), then Mr. Justice Mitchell, writing for the majority, stated:

The tort of invasion of privacy is now recognized, in one or more of its forms, in a majority of jurisdictions. . . . It is generally recognized that:

The right of privacy, as an independent and distinctive legal concept has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion.

The general law of the right of privacy, as a matter of tort law, is mainly left to the law of the states

Id. at 321, 312 S.E.2d at 411.

In *Renwick*, the majority listed four types of privacy torts recognized in American jurisdictions. These are: (1) appropriation of a plaintiff's name or likeness for a defendant's advantage; (2) intrusion upon a plaintiff's seclusion, solitude, or private affairs; (3) public disclosure of embarrassing private facts about a plaintiff; and (4) publicity that places a plaintiff in a false light in the public eye. *Id.* at 322, 312 S.E.2d at 411 (citing W. Prosser, *Handbook of the Law of Torts* § 117 (4th Ed. 1971)).

Our Supreme Court has held that a right of privacy exists in North Carolina and has recognized the first type of privacy tort, i.e., invasion of privacy by the unauthorized appropriation of a plaintiff's photographic likeness for a defendant's advantage as part of an advertisement or commercial enterprise. *Id.* (discussing *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938)). However, the Court has refused to recognize the third type, invasion of privacy by disclosure of private facts, *see Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988), or the fourth type, invasion of privacy by placing a plaintiff in a false light before the public. *See Renwick*, 310 N.C. at 322, 326, 312 S.E.2d at 411, 413.

In *Smith v. Jack Eckerd Corp.*, 101 N.C. App. 566, 400 S.E.2d 99 (1991), we defined the intrusion tort as follows:

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

"[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Smith, 101 N.C. App. at 568, 400 S.E.2d at 100 (quoting Restatement (Second) of Torts § 652B). However, in *Smith*, the intrusion complained of was not so highly offensive to a reasonable person as to constitute an invasion of privacy. *See Smith*, 101 N.C. App. at 569, 400 S.E.2d at 100.

The level of offensiveness here is infinitely higher than that complained of in *Smith*. Here, plaintiff's forecast of the evidence shows that defendants invaded his home, indeed, his bedroom, and placed a hidden video camera in his room which recorded pictures of him undressing, showering, and going to bed. Plaintiff's evidence also shows that defendant Annette Miller intercepted, sorted through, and threw away some of his mail and that defendant Massaroni picked up plaintiff's mail for her on one occasion. Acts of physically invading a person's home and opening his personal mail are wrongs protected by this tort. *See* Restatement (Second) of Torts § 652B, Comment b. (1977); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 117, at 854-56 (5th ed. 1984). Plaintiff had every reasonable expectation of privacy in his mail and in his home and bedroom. A jury could conclude that these invasions would be highly offensive to a reasonable person.

Unlike the privacy torts based on public disclosure of private facts and false light publicity, the intrusion tort does not implicate the First Amendment concerns addressed in *Renwick* and *Hall*. *See generally Renwick*, 310 N.C. at 323-26, 312 S.E.2d at 412-14; *Hall*, 323 N.C. at 265-69, 372 S.E.2d at 714-17. Recognition of this tort also does not duplicate other tort claims. An offensive physical contact is not required for the intrusion tort as it is for battery. *Cf. McCracken v. Sloan*, 40 N.C. App. 214, 216, 252 S.E.2d 250, 252 (1979) (stating battery elements). Severe emotional distress is not an element of this tort as it is for intentional and negligent infliction of emotional distress. *Cf. Waddle v. Sparks*, 331 N.C. 73, 82-84, 414 S.E.2d 22, 27-28 (1992) (stating that both emotional distress torts require severe emotional distress). The intrusion tort also does not duplicate trespass since trespass requires proof of an unauthorized entry on land possessed by another and this tort does not. *Cf. Matthews v. Forrest*, 235

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

N.C. 281, 283, 69 S.E.2d 553, 555 (1952) (stating elements of trespass). Thus, we conclude that the intrusion tort is actionable in this State.

We reject defendants' assertion that the marital relationship between plaintiff and defendant Annette Miller precludes plaintiff from asserting an intrusion claim. The couple agreed, in a written separation agreement, that plaintiff would have sole possession of the Buck Lane premises. Granted, the couple's attempted reconciliation may have voided this agreement. See N.C. Gen. Stat. § 52-102 (1991); *Schultz v. Schultz*, 107 N.C. App. 366, 368-73, 420 S.E.2d 186, 188-90 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). However, even if the separation agreement were nullified by the attempted reconciliation, there is evidence that, at the time of the intrusions, plaintiff and defendant Miller were living separately and had agreed that only plaintiff would live in the marital residence. The evidence raises a genuine issue of material fact as to whether plaintiff had authorized her to enter his house without his permission. Furthermore, there is no evidence that plaintiff authorized his wife or anyone else to install a video camera in his bedroom or to intercept and open his mail.

Although a person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons, such is not the case here where the spouses were estranged and living separately. Further, the marital relationship has no bearing on the acts of defendants Brooks, Hite, Brooks Investigations, and Massaroni. Plaintiff's marriage to defendant Miller did nothing to reduce his expectations that his personal privacy would not be invaded by perfect strangers. The acts of installing the hidden video camera and the interception of plaintiff's mail as alleged and forecasted are sufficient to sustain plaintiff's claims for invasion of privacy by intrusion on his seclusion, solitude, or private affairs. Plaintiff has offered sufficient proof of these acts, many of which are admitted in defendants' depositions, to survive summary judgment.

[2] Plaintiff also asserts that the trial court erred by granting summary judgment to defendants on his trespass claim. We agree.

To prove trespass, a plaintiff must show that the defendants intentionally, *Industrial Center v. Liability Co.*, 271 N.C. 158, 163, 155 S.E.2d 501, 506 (1967), and without authorization entered real property actually or constructively possessed by him at the time of the entry. *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. Even an author-

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

ized entry can be trespass if a wrongful act is done in excess of and in abuse of authorized entry. *Blackwood v. Cates*, 297 N.C. 163, 167, 254 S.E.2d 7, 9 (1979).

There is abundant record evidence showing that defendants, on more than one occasion, intentionally entered the Buck Lane house and premises and that plaintiff had possession at that time. The key issue in dispute is whether these entries were authorized.

Defendants assert that, as plaintiff's wife, defendant Miller was authorized to enter the house and could give others the right. Defendants further dispute plaintiff's testimony that he directed defendant Miller not to enter the house in his absence and without his permission. We conclude that there is a genuine issue of material fact on this issue. Even if she had permission to enter the house and to authorize others to do so, there is also evidence to create a genuine issue of material fact as to whether defendants' entries exceeded the scope of any permission given.

We further conclude that plaintiff's marriage to defendant Annette Miller does not automatically preclude his action for trespass. N.C. Gen. Stat. section 52-5 (1991) provides that a husband and wife may sue each other for damages sustained to their person or property as if they were unmarried. Here, the record evidence tends to show that the real property was titled solely in Terry Miller's name and that only he lived at the Buck Lane house. As discussed above, we recognize that the separation agreement executed by the couple may have been invalidated by their attempted reconciliation. *See Schultz*, 107 N.C. App. at 368-73, 420 S.E.2d at 188-90. Even so, there is a dispute of fact as to whether, after the reconciliation attempt failed, plaintiff instructed defendant Miller not to enter the premises without his consent.

"The essence of a trespass to realty is the disturbance of possession." *Matthews*, 235 N.C. at 283, 69 S.E.2d at 555. If plaintiff had the right of possession at the time of the entries and if defendant Miller had no such right, any entries made by her without plaintiff's consent, or by the other defendants, constitute trespass. This is true even if defendants entered the premises with a bona fide belief that they were entitled to enter the property since such a belief is no defense to trespass. *See Industrial Center*, 271 N.C. at 163, 155 S.E.2d at 506 (citing, *inter alia*, Restatement of Torts (Second) § 164). Similarly, defendants cannot escape liability by asserting that they relied on the

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

advice of counsel in mistakenly concluding that they were entitled to enter plaintiff's property. *See* Restatement (Second) of Torts § 164, Comment a. (1965).

Citing *Jones v. McBee*, 222 N.C. 152, 153, 22 S.E.2d 226, 227 (1942), defendants contend that plaintiff and defendant Miller are tenants in common so that plaintiff cannot maintain an action for trespass against her. As evidence of this assertion, defendants point to plaintiff's testimony, given in a previous criminal proceeding, that, after the marriage, both plaintiff and defendant Miller, signed a deed of trust enabling them to build a house on the Buck Lane lot.

A tenancy in common is created by a conveyance inter vivos or testamentary gift to two or more persons or when two or more persons acquire the property through intestate succession. *See* 2 Robert E. Lee, *North Carolina Family Law* § 123, at 85 (4th ed. 1980). None of these occurred in this case. Citing *Ward v. Ward*, 57 N.C. App. 343, 346, 291 S.E.2d 333, 335-36 (1982), defendants assert that a tenancy in common is created when a husband and wife purchase property and both pay or agree to pay part of the purchase price. *Ward* is not helpful to the defendants, however, because it deals with the purchase of personal property. Furthermore, evidence shows that the land on which the Millers built the Buck Road house was purchased by plaintiff prior to the marriage and that title to the property remained solely in plaintiff's name. We conclude that defendant Miller's signature on a deed of trust on the house does not, in itself, create a tenancy in common. Any equitable distribution or inheritance rights she acquired by her marriage to plaintiff do not establish that she was a tenant in common or that she otherwise had a right to possession at the time of the alleged trespasses. The trial court erred in granting summary judgment for defendants on plaintiff's trespass claim.

[3] Plaintiff further asserts that the court erred by granting summary judgment to defendants on his claim for intentional infliction of emotional distress. A plaintiff who asserts a claim for intentional infliction of emotional distress must prove that the defendant engaged in "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The second element may also be proven by a showing that the defendant acted with "reckless indifference to the likelihood" that his or her acts "will cause severe emotional distress." *Id.* To prove the third element, a plaintiff must prove that he has suffered a "*severe and disabling emo-*

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

tional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.” *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) (quoting *Johnson v. Ruark Obstetrics & Gynecology Ass’n*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh’g denied*, 327 N.C. 644, 399 S.E.2 133 (1990)).

Here, plaintiff has forecast sufficient evidence of these elements to survive summary judgment. A jury could reasonably find that the conduct of defendants in breaking into plaintiff’s house and installing a hidden video camera was “extreme and outrageous conduct.” On the issue of intent, the record suggests that defendant Miller knew, and told the other defendants, prior to installation of the camera, that plaintiff had a proclivity to be fearful, i.e., she knew and told them that he “slept with a loaded shotgun next to him.” Even if defendants did not intend specifically to cause him emotional distress, knowing these circumstances, the record raises a genuine issue of fact as to whether they acted with reckless indifference to the likelihood that installation of the camera, once discovered, would cause him emotional distress. Defendant Miller’s initial denial of her involvement, involvement which she later admitted in her deposition, also tends to show reckless indifference to the likelihood that plaintiff would continue to suffer emotional distress. She testified that after he questioned her about the camera and she denied any involvement, he became “real paranoid,” and “fearful for his life,” and that “it was my fault that he had gone through the week that he had gone through.”

Plaintiff has also forecast sufficient evidence of severe and disabling emotional distress to survive summary judgment. He testified that he was scared and worried and had difficulty sleeping after discovering the camera. Immediately after finding the camera in his bedroom, he stayed in a hotel room for two nights. Defendant Miller testified that, after he discovered the camera and before he confirmed her involvement, plaintiff was “real paranoid.” She further testified that he told her that he had to go into hiding and that she was aware that he “was riding around town with a loaded shotgun underneath his seat.” Although the record does not show that he sought medical attention for his symptoms, we conclude that a jury could reasonably conclude that the symptoms he suffered show a “*severe and disabling* emotional or mental condition” of a type “which may be generally recognized and diagnosed” by trained professionals and that the distress was “*so severe that no reasonable man could be expected to endure it.*” See *Waddle*, 331 N.C. at 83-84, 414 S.E.2d at 27-28.

MILLER v. BROOKS

[123 N.C. App. 20 (1996)]

[4] Plaintiff also asserts that the trial court erred by granting summary judgment on his "claim" for damages to real property. Plaintiff has not offered any cases, nor have we found any, that confer an independent claim for damages to real property. Thus, we treat this, not as a separate claim, but as a prayer for damages incident to plaintiff's trespass claim. Plaintiff has testified that defendants damaged his house by altering the wiring and drilling holes in the ceiling and that he paid expenses for repairs and to hire an electrician. We conclude that plaintiff has forecast sufficient proof to survive summary judgment on his prayer for damages to his real property.

[5] Plaintiff further contends that the trial court erred by granting summary judgment on his prayer for punitive damages based on his allegation that defendants acted willfully, intentionally, maliciously, and recklessly. A plaintiff who proves such aggravated conduct can recover punitive damages on a claim for intentional infliction of emotional distress, *Holloway v. Wachovia Bank and Trust Co.*, 339 N.C. 338, 348, 452 S.E.2d 233, 239 (1994), and on a claim for trespass. *Maintenance Equipment Co. v. Godley Builders*, 107 N.C. App. 343, 351, 420 S.E.2d 199, 203 (1992), *disc. review denied*, 333 N.C. 345, 426 S.E.2d 707 (1993). In accord with many other states, we hold that plaintiff may also seek punitive damages based on the intrusion tort upon proof of aggravated conduct. *E.g.*, *Estate of Berthiaume v. Pratt, M.D.*, 365 A.2d 792, 795 (Me. 1976); *LeCrone v. Ohio Bell Telephone Co.*, 201 N.E.2d 533, 536 (Ohio Ct. App. 1963).

Defendants assert that summary judgment was proper on the prayer for punitive damages because they relied on the advice of counsel in ascertaining that Annette Miller had a right to enter the house. We hold that reliance on the advice of counsel is a factor that may be considered by a jury in assessing the reasonableness of a defendant's conduct in regard to punitive damages, but it is not a complete defense. *Cf. Flippo v. Hayes*, 98 N.C. App. 115, 119, 389 S.E.2d 613 (stating that reliance on advice of counsel is a factor to be considered in assessing the reasonableness of a defendant's conduct in a malicious prosecution action, but is not a complete defense), *aff'd per curiam*, 327 N.C. 490, 397 S.E.2d 512 (1990); *see also* 22 Am. Jur. 2d *Damages* § 779 (1988).

Plaintiff's evidence of aggravated conduct includes the following: (1) that defendants knew plaintiff had paranoid tendencies making him particularly susceptible to their intrusions; (2) that defendants Brooks and Massaroni altered the wiring of his house although nei-

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

ther of them were licensed electricians; (3) that defendants placed the camera in the bedroom rather than in a less private area of the house; (4) that they went back into the house even after they discovered that the camera had been removed. Given this evidence, summary judgment was not proper on plaintiff's prayer for punitive damages.

Reversed and remanded.

Chief Judge ARNOLD and Judge WALKER concur.

IN THE MATTER OF: THE APPEAL OF LOUISE PARSONS AND JULIAN PRICE FROM
THE DECISION OF THE WAKE COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING
PROPERTY TAXATION FOR 1992

No. COA95-961

(Filed 2 July 1996)

**Taxation § 87 (NCI4th)— evaluation of property—arbitrary
method used by County**

Taxpayer appellees sufficiently met their burden of showing that Wake County used an arbitrary method of valuation which substantially exceeded the true value in money of taxpayers' property where the evidence showed that Wake County's appraiser had never appraised an undeveloped tract of land in Wake County of the size at issue in the present case; he admitted he never visited the property until a year after its valuation; all but one of the comparable sales used in his valuation occurred after the appraisal date; three of the comparables had higher density development than that which was appropriate for the subject property; the appraiser failed to make adjustments for topography, slope, or shape; the County's methodology of using a development approach solely for comparison with the sales comparison approach was inappropriate because Wake County used more lots than was feasible for the property, used a lot sales price that was too high, and an absorption rate that was too rapid; taxpayers' evidence showed that the highest and best use of the property given its location, zoning, topography, and other characteristics was residential development with 186 lots of one-half acre

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

each; their appraiser and expert used two valuation methods (the sales comparison approach and the development approach) which yielded substantially the same values, which were more than a third less than the County's value; and taxpayers' expert testified that the development approach most closely approximated true value.

Am Jur 2d, State and Local Taxation §§ 759-763.**Sale price of real property as evidence in determining value for tax assessment purposes. 89 ALR3d 1126.**

Appeal by Wake County from the North Carolina Property Tax Commission's decision entered 16 May 1995, affirming and adopting the Commission Representative's Recommendations reducing the appraised value of plaintiffs' property from \$3,376,865 to \$1,900,000. Heard in the Court of Appeals 24 April 1996.

Wake County Attorney's Office, by Deputy County Attorney Shelley T. Eason, for Wake County.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, for taxpayers-appellees.

JOHNSON, Judge.

Taxpayers Louise Parsons and Julian Price (taxpayers) are the owners of record of real property known as the Parsons-Price tract (tract). The tract is 194.77 acres of undeveloped land located on the west side of Pinecrest Road and the north side of U.S. Highway 70 West (Glenwood Avenue) across from Umstead State Park in Raleigh's extraterritorial jurisdiction. The tract's topography is rolling with gentle slopes. The north, west and east sites of the tract contain average to above-average residential subdivisions developed mostly in the 1970's and 1980's. Raleigh-Durham Airport is two miles to the northwest, but the subject property is not under flight paths and is not within the 55 decibel line. There are no unfavorable easements or encroachments on the tract. The site contains a lake approximately 28 acres in size (if floodplain areas are included). The tract is zoned R-4, allowing residential lots of 1/4 acre in size. Raleigh City water, sewer, trash collection, police and fire protection are available.

According to the appraiser of taxpayers, both the neighborhood and the tract "possess the needed attributes to support [single-family] residential development, that is ease of access, availability of utilities,

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

favorable topography, and compatibility with the surrounding properties.” The parties stipulated that the tract’s highest and best use was for residential development.

As of 1 January 1992, Wake County’s initial valuation of the tract was \$4,684,000. Taxpayers timely appealed this valuation to the Wake County Board of Equalization and Review (the Board), and the Board reduced the valuation of the tract to \$3,376,856. The land was assessed at \$3,289,975, or \$16,892 per acre; a dwelling located on the property was assessed at \$86,881. Of the sixteen other parcels of undeveloped real property in Wake County which have 100 or more acres zoned R-4, the comparable parcels were valued between \$2,209 and \$13,969 per acre, nevertheless, the county valued the Parsons-Price tract at \$16,892 per acre. Taxpayers appealed Wake County’s decision to the Property Tax Commission. They contended that the true value of the tract on 1 January 1992 was \$1,900,000 with no value for improvements.

At the hearing, taxpayers presented testimony of two expert witnesses. Wake County presented testimony of one expert witness. Taxpayers’ expert witness in real estate appraising and subdivision analysis was Robert S. Martin (Martin). He testified that he is the owner and president of Martin & Associates, an appraisal company in Winston-Salem, North Carolina, and that he prepared taxpayers’ appraisal report of the tract. Martin testified that he had been a certified real estate appraiser for nineteen years. He also testified that he was the author of a book entitled Subdivision Analysis which is used by real estate appraisers to value subdivision property, and the creator of a computer software program designed to aid and assist in valuing subdivision real property. Martin was accepted by the Commission without objection as an expert in “real estate appraising and subdivision analysis.”

Martin retained the engineering firms of Jerry Turner & Associates (Turner) to prepare a subdivision site plan, and Bass and Kennedy to prepare a projection of development costs for the site plan. Turner’s site plan included areas designated as a lake, greenways and buffers.

Martin testified that he inspected the tract on three different occasions prior to valuing the property. He prepared a report using two different valuation methods—the sales comparison approach and the development approach. Martin did a sales comparison approach which used five comparable sales from August 1986 to December

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

1991 and ranging in size from 160 to 563 acres. He testified that the effective date of valuation, 1 January 1992, required sales comparables which occurred prior to the effective date because "if we were doing that correctly, we wouldn't have information past that date." Martin also testified that it was not the standard and accepted practice to use sales occurring after the effective date unless "we really have no other choice." These parcels were valued from a low of \$10,900 per acre to a high of \$13,002 per acre. Martin made various adjustments to account for differences in topography, location, size, shape and availability of utilities. After making the necessary adjustments, Martin determined that the indicated value per acre using the sales comparison approach was \$12,000, for a total value of \$1,998,696. Martin did not rely on this approach exclusively for his final valuation of the property and opined that the development approach was "significantly more reliable."

Using the development approach, Martin compared proposed finished lots to be located in a subdivision on the subject property with sales of similarly sized lots in similar subdivisions. Martin testified that he had a site plan prepared for the property and an engineer prepared projected development costs. Martin took into account the topography of the property, including a lake with a dam, creek and "depressions" which were "below the level of the lake" and the creek. He also accounted for a "greenway," which he testified was an undeveloped buffer zone required to be set aside when developing residential property such as that at issue in the instant action.

Martin determined that the highest and best use for the property was one-half acre lots. He also determined that the property would best support 186 such half-acre lots, based on the topography and location of the land. Martin testified that half-acre lots preserved the wooded land and character of the property and decreased development costs. Martin also noted that the property in the immediate vicinity was composed of half-acre to three-quarter acre lots. Wake County claims that Martin rejected developing the tract at R-4 density for aesthetic reasons.

Martin's projected site plan was based on an average price of \$45,645 for each of the 186 lots. After making the necessary deductions for the costs of development, Martin valued the subject property, using the development approach, at \$1,900,000. Martin contrasted his lot density with that of Wake County, which projected 383 lots of .36 acres each. Martin noted that the maximum number of lots

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

that the property could support was 340, and testified that he did not believe Wake County's projection was "possible." Martin also testified that the average lot size in Wake County was .415 acre, and that sixty-six percent of all Wake County lots were larger than .4 acre. Seventy-six percent were larger than .36 acre.

Martin also testified that Wake County's projected price per .36 acre lot, \$35,000, was unreasonably high. Martin's research showed that, even assuming that 383 lots were feasible, the statistical information demonstrated an average price per lot of no more than \$32,120. Martin's evidence further showed that Wake County failed to account for the higher development costs (including "water, sewer and streets") which would accompany the denser development of 383 lots.

John P. Arenas (Arenas) was the second witness for taxpayers. His property evaluation report assessed the development and investment potential of the tract. Arenas determined the total number of lots by calculating the maximum number allowed by R-4 zoning (696.5 lots) and subtracting acreage for the lake, private roads (12 acres) for a maximum of 582 buildable homesite lots. He then calculated the present value as of 1 January 1992 to be \$1,732,475 based on 58 lots sales per year, at \$15,000 per .25 acre lot, despite taxpayers uncontradicted evidence that .28 acre lots in nearby subdivisions were selling for \$30,000 each in 1991.

By contrast, Wake County's appraiser and sole expert witness Ken McArtor (McArtor), who initially valued the property at \$4,684,000 purportedly based on the sales comparison approach, conceded that he was not licensed as an appraiser of real property in North Carolina or any other state in the United States and that he had never appraised an undeveloped tract of land in Wake County greater than 100 acres. McArtor further admitted that he had never visited the property prior to December 1992, almost one year after he valued it.

McArtor also admitted that the valuation in question was performed as part of a mass appraisal using a computer program. McArtor maintained that he performed certain calculations to adjust the computer program and "narrow things down," but testified that he had no worksheets to show his "refinement[s]" in this regard. McArtor conceded, but failed to offer an explanation for the \$1.3 million difference between his appraisal and the Board's original valuation. He also conceded that he made no adjustments for the topography, slope or shape of the property. He did, however, perform a

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

market study with regard to absorption rates for development. He also admitted that all but one of his comparable sales occurred after the appraisal date of 1 January 1992. Moreover, McArtor conceded that "the sales used in the appraisal was [sic] to support the value, and the value had already been set before those sales took place."

McArtor testified that his comparable sales occurred as late as 1994, two years after the property was valued and that he included as "comparable sales," property which was not zoned R-4. Wake County's appraiser admitted that three of the comparables he used had designations of R-6, R-8 and R-12 and that these designations reflected higher density development. The appraiser also testified that two of his comparable sales were in the Cary area, which was "the hottest area" in Wake County, and that he did not make an adjustment "for the hot area." When questioned with regard to his failure to take these various statutory factors into account, McArtor replied that "the opinion of value had already been determined. . . ."

McArtor testified as to six comparable Wake County sales of tracts 45 acres to 154 acres in size between July of 1990 to March of 1994, noting that the comparable sales adjusted for size and time supported a market value of \$3,376,856. To support Wake County's comparable sales valuation, McArtor utilized a development method model of land valuation using identical information and calculations to that used by Arenas, except using a 52 lot per year sales rate (a lower absorption rate than Arenas' 58 per year), larger lot sizes (.36 acre, a size commonly purchased in nearby subdivisions in 1991) and a per lot price supported by taxpayers' comparables of \$35,000 per lot (approximately \$100,000 per acre) with no premium for lakefront lots. This development approach model yielded a market value of \$3,233,649 for the tract.

At the close of the evidence, the Commission Representative ruled that Martin's development model, which offered 187 half-acre lots selling at a rate of 31 per year over 6 years provided the best estimate of value, \$1,900,000 (\$9,755 per acre).

The Commission made the following findings: that the sales comparison approach of valuation was inappropriate in this case; that taxpayers' residential development approach was the best method for valuing the tract; and that "the property is most suited for 186 half-acre lots with an average lot sales price of \$45,645." Wake County appeals.

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

We note at the onset that appellant's brief is in violation of the North Carolina Rules of Appellate Procedure, specifically Rule 28(b)(5) which states that appellate briefs must reference the pertinent assignments of error immediately after the question raised. As appellant Wake County's brief does not comply with Rule 28(b)(5), it may be deemed abandoned; however, in our discretion we address the merits of Wake County's appeal.

Wake County's first argument is that the Commission erred in rejecting its comparable sales approach valuation. We disagree.

The standard of review of a final order of the Commission is governed by North Carolina General Statutes section 105-345.2, which states:

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. . . .

N.C. Gen. Stat. § 105-345.2 (1995). Thus, a review of the Commission's decision requires this Court to review the whole record. *See In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981). The Court must decide

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

all relevant questions of law *de novo*, and review the findings, conclusions and decision to determine if they are affected by error or are unsupported “by competent, material and substantial evidence in view of the entire record.” *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218, *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993) (quoting N.C. Gen. Stat. § 105-345.2).

Other established principles to be employed by this Court in reviewing a decision of the Commission include the following:

(1) a reviewing court is not free to weigh the evidence presented to an administrative agency and substitute its evaluation of the evidence for that of the agency; (2) ad valorem tax assessments are presumed to be correct; (3) the correctness of tax assessments, the good faith of tax assessors and the validity of their actions are presumed; and (4) the taxpayer has the burden of showing that the assessment was erroneous. . . .

In re McElwee, 304 N.C. at 75, 283 S.E.2d at 120 (citations omitted). However, the presumption that Wake County’s assessment was correct is rebuttable.

[I]n order for the taxpayer to rebut the presumption [of correctness] he must produce “competent, material and substantial” evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of evaluation; AND (3) the assessment *substantially* exceeded the true value in money of the property. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*.

Id. If a taxpayer is able to produce

evidence that the appraisal methods used . . . would not produce true values . . . and that the values actually produced by these methods were substantially in excess of true value, [he has] rebutted the presumption of correctness. The burden of going forward with evidence and of persuasion that its methods would in fact produce true values then rest[s] with the [county]. And it becom[es] the Commission’s duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

circumstantial evidence, all in order to determine whether the [county] met its burden.

In re Southern Railway, 313 N.C. 177, 182, 328 S.E.2d 235, 239 (1985) (citing *In re McElwee*, 304 N.C. at 86-87, 283 S.E.2d at 126-27). Further, the Commissioner's findings of fact and conclusions of law are final if after a "review of the whole record they are supported by competent, material and substantial evidence." *In re Appeal of Lee Memory Gardens*, 110 N.C. App. 541, 545, 430 S.E.2d 451, 453 (1993).

At this juncture, we reiterate that it is the function of the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. We cannot substitute our judgment for that of the agency when the evidence is conflicting.

In re McElwee, 304 N.C. at 87, 283 S.E.2d at 126-27 (citing *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, *reh'g denied*, 301 N.C. 107, 373 S.E.2d 300 (1980)). A review of the whole record reveals that the Commission's decision was supported by substantial evidence.

Property in North Carolina is subject to taxation based on its "true" or fair market value. N.C. Gen. Stat. § 105-283 (1995). North Carolina General Statutes section 105-317 sets out the schedules, standards and rules upon which the value of real property is determined:

(a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

(1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; water-power; water privileges; dedication as a nature preserve; mineral, quarry, or other valuable deposits; fertility adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.

...

(b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the assessor to see that:

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

(1) Uniform schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property.

...

(3) A separate property record be prepared for each tract, parcel, lot, or group of contiguous lots, which record shall show the information required for compliance with the provisions of G.S. 105-309 insofar as they deal with real property, as well as that required by this section. (The purpose of this subdivision is to require that individual property records be maintained in sufficient detail to enable property owners to ascertain the method, rules, and standards of value by which property is appraised.)

(4) The property characteristics considered in appraising each lot, parcel, tract, building, structure and improvement, in accordance with the schedules of values, standards, and rules, be accurately recorded on the appropriate property record.

N.C. Gen. Stat. § 105-317 (1995). The fair market value of real property for tax purposes is the same as that for condemnation purposes. *Great Northern Railroad Co. v. Weeks*, 297 U.S. 135, 139, 80 L. Ed. 532, 535-36 (1936). In either case, the fair market value is “the highest market price [property] would bring for its most advantageous uses [at the time of taking] and in the foreseeable future.” *United States v. Cunningham*, 166 F.Supp. 76, 78 (E.D.N.C. 1958), *rev’d on other grounds*, 270 F.2d 545 (4th Cir. 1959), *cert. denied*, 362 U.S. 989, 4 L. Ed. 2d 1022 (1960). The term “highest and best use,” contemplates the most productive and lucrative use of land given the applicable physical, legal and governmental constraints. *See In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 474, 458 S.E.2d 921, 923-24 (1995), *aff’d*, 342 N.C. 890, 467 S.E.2d 242 (1996).

Wake County argues that it presented ample evidence of valid comparable sales of undeveloped tracts in the same vicinity as the tract at issue here; that all of the comparables had comparable topography, access to water and sewer, access to a major thoroughfare, the same or similar zoning and comparable locations; and that the dates of sales ranged from July of 1990 to March of 1994. A review of the evidence reveals that Wake County’s determination of \$3,289,975 was suspect. The evidence shows that Wake County’s appraiser had never

IN RE APPEAL OF PARSONS

[123 N.C. App. 32 (1996)]

appraised an undeveloped tract of land in Wake County of the size at issue in the instant case; that the appraiser admitted that he never visited the property until December 1992, a year after his valuation; that all but one of the comparable sales used in his valuation occurred after the appraisal date of 1 January 1992; that three of the comparables used had designations as R-6, R-8 and R-12, reflecting higher density development (only two were R-4); that he failed to make adjustments for topography, slope or shape; and that Wake County's methodology of using a development approach, although not for the purpose of determining value, but solely for comparison with the sales comparison approach, was inappropriate because Wake County used more lots than was feasible for the property, used a lot sales price that was too high and an absorption rate that was too rapid. Because Wake County's appraiser "built a schedule based on comparables[.]" but failed to relate the schedule to the requisite statutory elements pursuant to North Carolina General Statutes section 105-317(a)(1); it failed to procure a "true value in money." Additionally, Wake County's assessment was an arbitrary valuation which produced a value which was substantially in excess of the true value in money of the assessed property.

Taxpayers presented substantial evidence to rebut the presumption of correctness of Wake County's appraisal. Their evidence showed that the highest and best use of the property given its location, zoning, topography, and other characteristics was residential development with 186 lots of one-half acre each; that their appraiser and expert used two valuation methods (the sales comparison approach and the development approach) which yielded values of approximately \$1,900,000 and \$1,998,696; and that taxpayers' expert testified that the development approach most closely approximated true value.

Wake County correctly points out that our Courts have held that the development approach is not one of the three methods of appraising property; however, the record shows that taxpayers' appraisers also used the sales comparison approach which further supported valuation. Thus, taxpayers sufficiently met their burden of showing that Wake County used an arbitrary method of valuation which substantially exceeded the "true value in money" of the property. A review of the record reveals that the Commission properly determined the "true value in money" of the tract, and took into account all of the various factors which should be considered by assessors in determining the market value of property for tax purposes pursuant

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

to North Carolina General Statutes section 105-317(a)(1). Accordingly, this action is affirmed.

Affirmed.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; AND CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPLICANT APPELLEES v. PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR APPELLANTS

No. COA95-27

(Filed 2 July 1996)

Utilities § 51 (NCI4th)— sale of private utility to municipal system—distribution of gain—issues regarding future policy not before Court

Findings and conclusions supported the Utilities Commission's decision that a public utility should retain 100% of the gain on sale of two water systems, instead of splitting the gain between shareholder and customers, since evidence showed that a policy of equal splitting would result in a higher purchase price or might result in the sale being called off; beneficial transfers of privately held utilities to municipal systems had been hampered by a policy of splitting gain on sale; and assigning 100% of the gain to the shareholder would encourage the private utility to make further investments in other smaller water systems, some of which may be undercapitalized or poorly run. The issue of whether the Commission's new policy concerning the future assignment of gain or loss upon the sales of water and/or sewer utilities complied with due process was not before the Court of Appeals.

Am Jur 2d, Public Utilities §§ 9 et seq.

Appeal by intervenor-appellant from orders entered 7 September 1994 and 14 November 1994 by the North Carolina Utilities Commission. Heard in the Court of Appeals 5 October 1995.

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

Applicant-appellee Carolina Water Service, Inc. of North Carolina (CWS), a duly franchised public utility, owns numerous water and sewer systems in North Carolina. On 18 November 1993 and 16 February 1994 respectively, CWS filed applications with the North Carolina Utilities Commission (the Commission) to relinquish CWS' certificates of public convenience and necessity to provide water for the Farmwood B and Chesney Glen service areas and to transfer its utilities assets for these systems to the Charlotte-Mecklenburg Utility Department (CMUD). Additionally, CWS requested the Commission allow CWS' sole shareholder, Utilities, Inc., to keep 100 percent of the gain on the sale of the two systems. Intervenor-appellant Public Staff—North Carolina Utilities Commission (Public Staff) filed a motion for a hearing before the full Commission on CWS' applications.

The Commission consolidated the two applications and conducted a public hearing on 7 June 1994. All sides agreed the transfer of the two systems to CMUD would be in the best interests of the ratepayers within those systems because of increased service and lower rates. The sole contested issue was how the gain on sale of the systems would be distributed. Public Staff argued the gain should be equally divided between CWS' shareholder and CWS' remaining ratepayers in accordance with the policy for gain splitting previously adopted by the Commission. Public Staff contended CWS' remaining ratepayers should be entitled to share in any gain on the sales through a "gains follows risk" or "economic benefit follows economic burden" analysis because: (1) the remaining ratepayers had helped to maintain the systems through previous payment of their water bills, and (2) they also bore the risk of making up for any catastrophic losses to the systems' facilities through the rates they paid. CWS argued that a policy of splitting the gain on sale served as a disincentive for privately held utilities to sell their systems to municipal utilities, even though such sales would be beneficial to the ratepayers within the systems.

The Commission granted a motion by CWS, which Public Staff did not oppose, to sever the issue of transfer of the systems from the issue of treatment of gain on sale. Thereafter, the Commission entered an order approving the sales on 6 July 1994. On 7 September 1994 the Commission issued an order determining that 100 percent of the gain on sale of the two systems should be assigned to CWS' shareholder. Further, the Commission held that in the future, absent overwhelming and compelling evidence to the contrary, it would follow a policy of assigning 100 percent of the gain or loss on the sale of water and sewer systems to utility company shareholders.

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

Public Staff filed notice of appeal and a motion for reconsideration by the Commission. The Commission entered an order dated 14 November 1994 which denied Public Staff's motion for reconsideration and reaffirmed the 7 September 1994 order. Public Staff also filed a notice of appeal to the 14 November order. From the orders allowing CWS' shareholder to retain 100 percent of the gain on sale of the Farmwood B and Chesney Glen water systems and announcing the Commission's future policy regarding assignments of gain and loss, Public Staff appeals.

Hunton & Williams, by Edward S. Finley, Jr. and James L. Hunt, for applicant-appellee Carolina Water Service, Inc. of North Carolina.

Public Staff, Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, and Paul L. Lassiter, Staff Attorney, for intervenor-appellant Public Staff—North Carolina Utilities Commission.

McGEE, Judge.

The only statutory grounds argued by Public Staff in its brief for reversing the decision to assign 100 percent of the gain from the sales of the two systems to CWS' shareholder are that the order was arbitrary and capricious and not supported by competent, material and substantial evidence. Further, Public Staff argues the Commission's announcement that in the future it would assign 100 percent of the gain or loss on the sale of utilities to the utility shareholders violated due process. However, as set forth below, this last issue is not properly before us. After reviewing the record, we affirm the order of the Commission.

On appeal, a rate decision, rule, regulation, finding, determination, or order made by the Commission is deemed *prima facie* just and reasonable. N.C. Gen. Stat. § 62-94(e). "[J]udicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the [statutory] criteria which circumscribe judicial review." *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 20, 273 S.E.2d 232, 235 (1981). Appellate review of an order of the Commission is governed by subsections (b) and (c) of N.C. Gen. Stat. § 62-94. *State ex rel. Utilities Comm. v. Southern Bell*, 88 N.C. App. 153, 165, 363 S.E.2d 73, 80 (1987). "[W]here the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence.” *Utilities Comm. v. Springdale Estates Assoc.*, 46 N.C. App. 488, 494, 265 S.E.2d 647, 651 (1980). In determining whether to uphold the Commission’s actions, the appellate court shall review the whole record. N.C. Gen. Stat. § 62-94(c). When applying the whole record test, the court may not replace the Commission’s judgment with its own when there are two reasonably conflicting views of the evidence. See *White v. N.C. Dept. of E.H.N.R.*, 117 N.C. App. 545, 547, 451 S.E.2d 376, 378, *disc. review denied*, 340 N.C. 263, 456 S.E.2d 839 (1995).

Public Staff argues the Commission incorrectly determined that it was in the best interest of the consuming public to implement a policy whereby 100 percent of the gains and losses on sale will be distributed to utility shareholders. Public Staff contends the better policy would be to allow ratepayers who share the risk of loss to also share in capital gains upon the sale of utilities. However, it is not and should not be this Court’s role to determine the merits of policy positions adopted or rejected by the Commission. “[The reviewing court’s] statutory function is not to determine whether there is evidence to support a position the Commission did not adopt. We ask, instead, whether there is substantial evidence, in view of the entire record, to support the position the Commission *did* adopt.” *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987). The General Assembly has given the Commission, not the courts, the authority to regulate the operations of public utilities. N.C. Gen. Stat. § 62-2. Therefore, if the findings and conclusions of the Commission are supported by competent, substantial and material evidence, this Court must affirm the decision even if we might have reached a different determination upon the evidence. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 336-37, 189 S.E.2d 705, 717 (1972).

Public Staff contends the Commission’s order is not supported by competent, substantial, and material evidence and is arbitrary and capricious. We disagree. When addressing a question of the sufficiency of the evidence, this Court has described the proper standard of review from a decision of the Commission as follows:

[T]he Commission’s order [is] to be affirmed if, upon consideration of the whole record as submitted, the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

evidence from which conflicting inferences could be drawn. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Springdale Estates, 46 N.C. App. at 490-91, 265 S.E.2d at 649 (citations omitted). Upon review of the whole record, we find it contains relevant evidence which "a reasonable mind might accept as adequate" to support the Commission's decision.

To support its decision, the Commission made, among others, the following findings and conclusions:

Events occurring since the Commission initially established its gain splitting policy in 1990 indicate that such policy, contrary to the public interest, serves as a disincentive to sell and may thereby discourage and impede beneficial sales to municipal and other government-owned entities. . . .

CWS provided evidence that shows that action has been taken in response to the Commission's decision in past dockets to split the gain that is harmful to the public interest and that such developments exemplify why the Commission's gain splitting policy can be detrimental and should be revised. CWS states further that through written statements in the past Orders, upon which the Public Staff relies, certain members of the Commission have questioned the wisdom and appropriateness of the past decisions to equally split gains. Through these written statements, those Commissioners have suggested that the issue should be revisited and that the ramifications to the public good of the decision to split the gains should be taken into account. Based on those statements, CWS argues that the Public Staff's reliance on the past holdings equally splitting gains is inappropriate and not in the public interest.

With the benefit of hindsight, the Commission can now see that the policy to split gains or losses on sales of water and/or sewer systems has had a negative impact on the public good. For example, the proposed sale of the Beatties Ford system from CWS to CMUD in 1990 was renegotiated after this Commission ruled to split the gain. That resulted in the Charlotte-Mecklenburg taxpayers and ratepayers spending more on the acquisition of the Beatties Ford system than they would have spent if this Commission's ruling had been to flow the gain to stockholders only. Furthermore, the Farmwood "B" contract between CWS and

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

CMUD contains a provision wherein the price to CMUD escalates in proportion to the portion of any gain that is flowed to CWS's remaining customers. In addition, all involved parties know that CWS chose not to sell its Riverbend utility system as a result of the Commission's ruling in Docket No. W-354, Sub. 88.

These facts, consequences of the Commission's decisions in the prior CWS and [Heater Utilities, Inc. ("Heater")] dockets, suggest that the Commission's gain splitting policy is contrary to the public interest. A policy of gain splitting for sales of water and/or sewer systems may undermine the achievement of economies of scale and encourage inefficient operations. That result is clearly not in the public interest. Moreover, with respect to Beatties Ford, the sales price for Beatties Ford, paid from public funds, was artificially increased. The sales price for [the Genoa subdivision water system] was reduced to the detriment of CWS. The beneficial sale of [the Riverbend subdivision water system] to [the City of] New Bern fell through. None of those harmful consequences would have taken place but for the Commission's decision to split the gain. On balance, the marginal benefit to remaining ratepayers of the gain splitting policy is outweighed by the harmful consequences of such policy. . . . [T]he Commission should not impose economic barriers to the orderly transfer of water systems to municipal entities, as was inadvertently done in the Riverbend situation.

If economic incentives are removed so that this succession of ownership becomes inadvisable, customers are denied those benefits. If companies like CWS are prevented from retaining the gain on sale in North Carolina, a substantial incentive is removed for those companies to buy systems from developers or small, undercapitalized operators in the first instance. Likewise, a substantial incentive is removed to negotiate to sell systems to municipal or governmental entities. At a minimum, the sale price is artificially increased above the fair market based price to adjust for the payment of part of the gain to customers. The result is harm to consumers because the natural progression of transfer of ownership to the most efficient provider is disrupted. These harmful consequences are clearly not in the public interest. . . .

The detrimental effect of the Commission's gain splitting policy as it pertains to the sale of water and/or sewer systems is reflected in the transactions at issue in this case. The purchase

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

price for the Farmwood "B" system increases by \$58,000 if the Commission requires CWS to split 50% of the gain with the remaining [ratepayers.] This is an added taxpayer expense that is inconsistent with the public interest. It appears that this provision would not have been included in the CWS-CMUD contract except in response to the Commission's gain splitting policy.

These findings and conclusions support the Commission's decision that CWS should retain 100 percent of the gain on sale of the water systems, and we determine that the record contains substantial, material, competent evidence to support the findings.

The order states these findings were based on evidence "found in the applications and the testimony of [CWS] witness Daniel and Public Staff witnesses Rudder and Fernald." Carl Daniel, vice president of CWS, testified that a policy of splitting the gain on sale acted as a disincentive for privately held utilities to sell facilities to municipalities. Daniel testified this adversely impacted consumers because additional public funds would have to be expended. If CWS did not sell its facilities, CMUD, whose charter requires it to provide service to Farmwood B and Chesney Glen, would be forced to incur the additional expense of completely duplicating the existing facilities. Customers would have to pay tap-on fees of several thousand dollars to fund these duplication costs. Daniel also testified customers benefit by transferring to a municipal utility because of better fire protection, lower homeowners insurance premiums, better system reliability, lower usage rates, and improved water taste. He further testified that a policy of allowing the shareholder to keep 100 percent of the gain on sale would encourage CWS to continue to purchase smaller utility companies that may be having problems in serving their customers. Daniel also testified, and the record contains a copy of the contract, that CMUD's purchase price for the Farmwood B system would be \$58,000 higher if the Commission allowed CWS to retain only 50 percent of the gain on sale as opposed to 100 percent.

Katherine Fernald, water supervisor in the accounting division of Public Staff, testified on cross-examination that CWS negotiated a higher price with CMUD for its Beatties Ford facilities and that a deal to sell the Riverbend system to the City of New Bern fell through after the Commission announced its policy of splitting gains between the shareholder and ratepayers. Fernald testified the ratepayers within the Riverbend system wanted the system sold and preferred to have service provided by a municipality. She also testified that by selling

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

facilities, CWS reduces its customer base and loses economies of scale.

We conclude that a reasonable mind would regard the testimony of Daniel and Fernald, along with the other materials contained in the record, to adequately support a conclusion that the best interests of the public would be served by allowing CWS to keep 100 percent of the gain on sale of the Farmwood B and Chesney Glen systems. The evidence showed a policy of equally splitting gains on sale would result in a higher purchase price for the Farmwood B system, causing a greater burden for Charlotte-Mecklenburg taxpayers. Also, the contract stated that if CWS was required to share more than 50 percent of the gain with the ratepayers, then the sale could be called off. The evidence also showed the beneficial transfers of privately held utilities to municipal systems had been hampered by a policy of splitting gain on sale. In this case, if CWS had refused to sell the facilities, CMUD would have been forced to duplicate the existing facilities at a high cost. Further, a policy of assigning 100 percent of the gain to the shareholder encourages CWS to make further investments in other smaller water systems, some of which may be undercapitalized or poorly run.

We also disagree with Public Staff's contention that the Commission's order was arbitrary and capricious.

The arbitrary and capricious standard is a difficult one to meet. Agency actions have been found to be arbitrary and capricious when such actions . . . "indicate a lack of fair and careful consideration; [and] when they fail to indicate 'any course of reasoning and the exercise of judgment.' "

White, 117 N.C. App. at 547, 451 S.E.2d at 378 (citations omitted). Here, a review of the order and record shows the Commission gave fair and careful consideration to the issues before it, and that the Commission's final decision was the product of reasoning and the exercise of its judgment.

We agree with Public Staff that several of the Commission's findings and conclusions appear to be improperly based upon the Commission's knowledge of events and evidence outside of this record. *See Utilities Commission v. Coach Co.*, 261 N.C. 384, 391, 134 S.E.2d 689, 695 (1964) ("[T]he Commission's knowledge, however expert, cannot be considered by us on appeal unless the facts embraced within that knowledge are in the record."). Also, the Public

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 43 (1996)]

Staff's argument that the record needed additional evidence on certain issues is well taken. For example, although one could conclude that the higher renegotiated price for the Beatties Ford System and the failure to complete the Riverbend sale directly resulted from the Commission's gains splitting policy, the record contains no direct testimony or evidence that the policy was the sole cause of these changes nor any evidence concerning whether other circumstances may also have been involved. However, we find the evidence that is contained in the record to be sufficient to support the Commission's order that CWS retain all of the gain on sale of the Farmwood B and Chesney Glen systems.

Lastly, Public Staff assigns as error the Commission's statement that "[I]n future proceedings, the Commission will follow a policy, absent overwhelming and compelling evidence to the contrary, of assigning 100% of the gain or loss on the sale of water and/or sewer utility systems to utility company shareholders." However, this issue is not properly before this Court and we need not decide it.

Public Staff argues the Commission violated due process by announcing this policy without holding a hearing before all interested parties. However, Public Staff cited no authority for this proposition and this argument is deemed abandoned. N.C.R. App. P. 28(b)(5). Further, an appellate court will not consider constitutional questions, such as a violation of due process, when they are "not necessary to the decision of the precise controversy presented in the litigation before it." *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969). By its language, the policy pronouncement complained of by Public Staff applies to future cases before the Commission. It is prospective in nature and had no bearing upon this case. As such, the issue is not ripe for determination. Therefore, we decline to decide whether the Commission's new policy concerning the future assignment of gain or loss upon the sales of water and/or sewer utilities complies with due process.

For the reasons stated, the order of the Commission is affirmed.

Affirmed.

Judges MARTIN, John C., and JOHN concur.

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

IN THE MATTER OF: THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY C AND M INVESTMENTS OF HIGH POINT, INC. TO RAYMOND D. THOMAS, TRUSTEE RECORDED IN BOOK 3846 AT PAGE 1446 GUILFORD COUNTY REGISTRY

No. COA95-1052

(Filed 2 July 1996)

1. Mortgages and Deeds of Trust § 46 (NCI4th)— failure to comply strictly with conditions of release—release allowed—release credits not applied to principal amount—default

A purchaser who defaulted on payments under a promissory note secured by a purchase money deed of trust had a right to a release of a 28.68-acre tract from the deed of trust, even if it did not comply with the conditions precedent set forth in the release agreement, where the purchaser made principal payments sufficient for a release of this tract prior to its default, since to allow the seller to retain the principal payments made by the purchaser as per the requirements of the note and to allow the seller to foreclose on the property that the purchaser had paid to have released would amount to a windfall; the only condition with which the purchaser did not comply was setting forth the property to be released on a recorded plat; even though the deed of trust stated that default would occur if improper payments were made, the seller continued to accept payments from the purchaser which were less than the required principal payment; and it was the seller's duty to initiate the foreclosure action once default occurred.

Am Jur 2d, Mortgages §§ 1045 et seq., 1128 et seq.

Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made. 41 ALR3d 7.

2. Mortgages and Deeds of Trust § 51 (NCI4th)— property release credit not payment—default

A purchaser was required to make a principal payment due under a promissory note secured by a purchase money deed of trust even though the purchaser had a property release credit in excess of the principal payment then due where the note and release agreement provided that release credits were not to be applied toward principal payments due under the note.

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

Therefore, the purchaser's failure to make the required principal payment constituted a default under the note.

Am Jur 2d, Mortgages §§ 417 et seq.

Appeal by petitioner from order entered 3 May 1995 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 20 May 1996.

On 13 November 1990, C & M Investments of High Point, Inc., (C & M), purchased from Walker Heirs, Inc. 280 acres of land in Guilford County. That same day the parties also entered into a release agreement. A purchase price of \$1,258,740.00 was paid, \$338,685.00 in cash and the rest financed by the seller through a promissory note in the amount of \$920,055.00. The promissory note is secured by the purchase money deed of trust which is the subject of this action. Shortly after the purchase, respondent C & M transferred the subject property to respondent Browns Summit Development Corporation, (BSDC).

The release agreement between the parties was incorporated by reference into the deed of trust. The agreement permitted BSDC to seek a release of property from the deed of trust once BSDC complied with certain conditions set forth in the note and the release agreement.

In consideration of the down payment of \$338,685.00, C & M was entitled to a release of certain lots totaling 61.7 acres, contingent upon compliance with the conditions in the release agreement. The initial release did not occur until 4 November 1991 when 52.267 acres rather than 61.7 acres were released, with the remaining 9.43 acres to be released at a later time. This left C & M with a release credit worth \$42,448.50. The parties agreed by letter that BSDC was entitled to a release of the 9.43 acres on any lot in Phase II of the project after Phase II had been platted and as long as the conditions precedent to the release set forth in the original release agreement were met. On 28 October 1993 BSDC decided that they wanted a release of 28.68 acres based on the existing 9.43 credit and they would provide a cashier's check in the amount of \$10,750.50 to make up for the amount needed to release 28.68 acres according to the release agreement. BSDC requested release of the 28.68 acres on 28 October 1993 and 28 April 1994 and were denied both times because they had not complied with the conditions precedent in the release agreement. BSDC then failed to make the 1 November 1993 semi-annual payment

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

due under the note. Raymond D. Thomas, as trustee notified BSDC of their default under the note 15 November 1993. The letter of credit posted by BSDC, for the completion of the roads, with Guilford County as the beneficiary, was up for renewal 27 November 1993. The Guilford County Planning Department refused to renew the letter of credit and instead "called" the letter of credit. The Guilford County Planning Department received the full amount of the letter of credit in cash and has since kept it on deposit. On 22 April 1994 BSDC submitted a drawing (not a plat) of the 28.68 acres for the purpose of being recorded with the County Register of Deeds.

The Honorable Sharon R. Williams, Assistant Clerk of Superior Court of Guilford County, entered an order 21 September 1994 authorizing the Trustee to conduct a foreclosure sale. BSDC gave notice of appeal to the Superior Court of Guilford County and the matter came on for hearing before the Honorable W. Douglas Albright 10 April 1995. Judge Albright entered an order and judgment on 3 May 1995 reversing the decision of the Clerk and denying the petition for foreclosure. From this order Walker Heirs, Inc. appeals.

Adams Kleemeier Hagan Hannah & Fouts, by M. Jay DeVaney and David S. Pokela, for petitioner appellant.

Elrod Lawing & Sharpless, P.A., by Frederick K. Sharpless, for respondent appellee.

ARNOLD, Chief Judge.

[1] Petitioner first argues that BSDC had no right to a release of the 28.68 acre tract in October of 1993 because it did not comply with the conditions precedent set forth in the release agreement. We disagree.

The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings. *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *review denied*, 310 N.C. 744, 315 S.E.2d 703 (1984).

A foreclosure sale pursuant to a power of sale contained in a deed of trust will be authorized only if the existence of the following four elements is found:

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

(i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such. . . .

N.C. Gen. Stat. § 45-21.16(d) (1991). Foreclosure under a power of sale is not favored in the law, and its exercise “ ‘will be watched with jealousy.’ ” *In Re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (quoting *Spain v. Hines*, 214 N.C. 432, 435, 200 S.E. 25, 28 (1938)). Thus, the issue presented in the present case is, what property is encumbered by the deed of trust in light of the release agreement between the parties and, therefore; what property is eligible for foreclosure due to default under the note.

The release agreement incorporated in the original deed of trust in pertinent part appears as follows:

WHEREAS, WALKER AND DEBTOR desire to enter into an agreement in regard to the release of the REAL ESTATE from the terms and conditions of the DEED OF TRUST as hereinafter set forth; and

. . . .

1. CONDITION PRECEDENT TO RELEASE

It is understood and agreed that the DEBTOR shall not be entitled to any release of any of the REAL ESTATE until that part which is sought to be released is set forth on a duly recorded plat as a designated lot thereon, and said plat is in conformity with the ORDINANCE and approved by the appropriate agency in Guilford County which shall administer the ORDINANCE. It is further agreed that no release of the REAL ESTATE will be made until any streets or roads on any recorded plat shall have been built or bonded to be built in accordance with the ORDINANCE and the rules and regulations of the Department of Transportation of North Carolina, if the latter approval be required. No partial platted lot shall be released, but only a total platted lot. In addition, any remaining portion of the REAL ESTATE not released shall have access to public roads or streets.

2. RELEASE FOR DOWNPAYMENT

At closing of the transaction, the DEBTOR paid to Walker a down payment of \$306,685.00. In consideration of said downpayment, the DEBTOR shall be entitled to a release from the DEED OF TRUST Lots 2, 3, 6, 7, 26, 27, 28, 29 and 30 of Sec. 1 or desig-

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

nated lots with comparable acreage in Sect. 1 without further payment. However, such release shall be subject to the provision of Paragraph 1 above, and further the entire area designated as Sec. 1 on the SUBDIVISION shall have been recorded as a subdivision plat in the Office of the Register of Deeds of the Guilford County.

....

4. OTHER RELEASES

As to all other lots set forth on the SUBDIVISION, and subject to the conditions herein set forth, a release payment of \$4,500.00 per acre shall be paid. There will be no deduction for that REAL ESTATE which lies within the Greenway as set forth on the SUBDIVISION.

5. APPLICATION OF RELEASE PAYMENTS

All payments herein made for releases shall be applied toward the next payment of principal and interest due on the NOTE, and if the amount of the same shall be equal to or greater than the next semi-annual payment called for in the NOTE when added to any prior release payment being applied to the same semi-annual payment, then said semi-annual payment will have been considered paid. Any excess shall be applied to next semi-annual payment.

“In general, a condition creates no right or duty but is merely a limiting or modifying factor in a contract.” *Goforth* at 375, 432 S.E.2d at 859 (quoting 17A Am. Jur. 2d *Contracts* § 468 (1991)). “Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability. . . .” *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 117, 123 S.E.2d 590, 595 (1962). A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. *Farmers Bank v. Brown Distributors*, 307 N.C. 342, 350, 298 S.E.2d 357, 362 (1983). “Conditions precedent are not favored by the law and a provision will not be construed as such in the absence of language clearly requiring such construction.” *Cox v. Funk*, 42 N.C. App. 32, 35, 255 S.E.2d 600, 601 (1979) (citing *Price v. Horn*, 30 N.C. App. 10, 17, 226 S.E.2d 165, *review denied*, 290 N.C. 663, 228 S.E.2d 450 (1976)).

Before any release of property could occur, BSDC had to (1) have the part of the property sought to be released set forth on a duly

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

recorded plat as a designated lot thereon; (2) the plat was to be in conformity with the ORDINANCE and approved by the appropriate agency in Guilford County which administers the ORDINANCE; (3) no release would be made until any streets or roads on any recorded plat had been built or had been bonded to be built in accordance with the ORDINANCE and the rules and regulations of the Department of Transportation of North Carolina, if the latter approval was required; (4) no partially platted lot would be released and (5) any remaining portion of the real estate not released was to have access to public roads or streets. Further, according to the promissory note, principal payments were to be made in 11 semi-annual installments of seventy-six thousand six hundred seventy-one and 26/100 dollars (\$76,671.26) plus accrued interest commencing May 1, 1991 and continuing on the first day of November, 1991 and continuing on the first day of each May and November thereafter until November 1, 1996 when the balance of principal and accrued interest would be due and payable in full. Payments made would be applied towards the next semi-annual payment and any excess payment would be applied towards the next semi-annual payment.

The semi-annual payments made under the note and any excess payments served a dual purpose. First, payments were applied towards the amount due under the note. Secondly, they were applied towards the release of the encumbered property. Acreage encumbered by the deed of trust was to be released at the rate of \$4500.00 per acre. So, if for example a payment of \$76,761.26 was made, then \$76,761.26 would be applied towards the principal payment and 17.06 acres ($\$76,761.26 / \$4500.00 = 17.06$ acres) would be released. When BSDC made a payment they also had to make a demand for release of property if they had satisfied the conditions precedent to release. If no demand was made, then BSDC accumulated a "release credit." Release credits went up as principal payments were made and they decreased as property was actually released. The total purchase price of the property was \$1,258,740.00, of which \$338,685.00 was paid in cash at closing by C & M to Walker. The remainder of the purchase price was financed by the seller through a purchase money promissory note executed 13 November 1990 by C & M in the original amount of \$920,055.00.

After the initial down payment, Walker was to release 61.7 acres. However, only 52.267 acres were actually released. In a letter dated 4 August 1993, the parties agreed that BSDC could use their credit of 9.433 acres and apply it towards a release of acreage on any lot in

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

Phase II after Phase II had been platted and the other conditions had been met. Then on 28 October 1993, BSDC decided that they wanted a release of 28.68 acres based on the existing credit of 9.433 acres (\$42,448.50) and the payment made on 9/17/93 (\$76,761.26). However, they were approximately \$10,750.50 short of the amount needed to release the 28.68 acres. BSDC agreed to provide a cashier's check for the additional amount in order to finalize the release.

At the time BSDC requested the release, a plat of the 28.68 acres had not been recorded. Instead, DeLacy M. Wyman, employed by the Guilford County Planning Department, testified that BSDC had submitted a drawing, approved by the Guilford County ordinance, for the purpose of being recorded with the County Register of Deeds. The roads on the drawing were not constructed nor had they been approved by the North Carolina Department of Transportation. He also testified that a letter of credit for the construction of the roads was in place but was called on 29 November 1993. The letter of credit in the amount of \$166,00.00 was based on a set of construction plans prepared by the developer of the property, but it was discovered that the plans were not adequate because the estimate was based on a residential street, rather than an industrial street. The plans were rejected because the city of Greensboro decided they were not going to permit any more hookups to city water and sewer from that part of the county on this project. Mr. Wyman testified that he had correspondence indicating that the public water could be extended to the property and that sewer could also be extended. In order to have the sewer extended other property owners would have to agree to allow sewer to extend through their property and no agreement had been reached on that issue. If the sewer were not extended, lots would have to be larger and would be served by septic tanks, which would preclude certain industrial uses of the property. The County refused to renew the letter of credit and called it 29 November 1993. The letter of credit was converted into cash and the County still has the cash on deposit. BSDC made requests for the release of the 28.68 acres in October of 1993 and April of 1994. In October BSDC was denied release because they had not complied with the condition of recording a plat of the tract prior to seeking a release. In April BSDC was denied release because they had not made a principal payment in November of 1993, and because the roads to be built were no longer bonded.

The facts of *In Re Foreclosure of a Deed of Trust of Michael Weinman Assoc.*, 333 N.C. 221, 424 S.E.2d 385 (1993), are similar

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

to those of the instant case. Weinman contracted with North Mecklenburg Associates to purchase 402.67 acres for approximately \$3500 per acre. *Id.* at 223, 424 S.E.2d at 386. The purchase price was to be adjusted based upon a survey to determine the actual acreage. *Id.* In the contract Weinman had the option of electing to have North Mecklenburg finance a portion of the property, Mecklenburg would then permit Weinman to make a payment of twenty-five percent of the final purchase price at the time of closing, and three successive payments plus accumulated interest at the time of each such payment. *Id.* at 224, 424 S.E.2d at 386. The contract further provided:

Should this option be exercised, Buyer agrees to prepare a land use map showing the property being divided into four parcels with equal road frontage.

One parcel representing approximately 25% of the land on one end of the property would be released at closing, and additional contiguous parcels would be released at one year intervals as payments outlined above are made.

Id. Weinman elected to have Mecklenburg finance a portion of the property in accordance with these provisions of the contract. *Id.* At closing Weinman made a payment of \$350,139.13, representing twenty-five percent of the purchase price, and executed and delivered to Mecklenburg a promissory note in the amount of \$1,050,417.37 for the balance of the purchase money, together with a purchase money deed of trust for the property securing the promissory note. *Id.* Weinman proceeded to make full payment on Tract 2 but did not have the requisite survey work completed. *Id.* at 225, 424 S.E.2d at 387. The Supreme Court held that Weinman's default on Tracts 3 and 4 did not authorize North Mecklenburg to refuse to release Tract 2 and to include Tract 2 in the foreclosure. *Id.* at 229, 424 S.E.2d at 389.

While the facts are slightly different in the present case from those in *Weinman*, to allow the appellant to retain the principal payments paid by BSDC as per the requirements of the note, and to allow them to foreclose on the property that BSDC has paid to have released would amount to a windfall. While BSDC did not strictly comply with the conditions precedent in the release agreement, public policy dictates that appellant should not be allowed to receive a double recovery. The trial court found that the roads to be built had been properly bonded, thus the only condition BSDC had not complied with was the requirement of setting forth the property to be released on a recorded plat. Even though the deed of trust states that

IN RE FORECLOSURE OF C AND M INVESTMENTS

[123 N.C. App. 52 (1996)]

default will occur if improper payments are made, appellant continued to accept payments from BSDC that were less than the required principal payment. It was appellant's duty to initiate the foreclosure action once default occurred. Therefore, we find that BSDC is entitled to have such property released from the deed of trust as was paid for prior to their default 1 November 1993. The payment history between the parties indicates that BSDC is entitled to a release of 28.68 acres from the deed of trust. There is competent evidence in the record to support the trial court's conclusion that BSDC is entitled to a release of the 28.68 acres.

[2] Appellant's second assignment of error is that the trial court erred in finding and concluding that BSDC did not have to make the November 1993 payment because of a then existing release credit. We agree.

The trial court found and concluded the following:

4. Because respondent had paid \$119,209.76 for releases of property in excess of the property that had been released, respondent's failure to make the November 1, 1993 payment on the note did not constitute default.

6. Respondent's failure to make the payment of May 1, 1994, on or before May 10, 1994, constituted a default under the promissory note.

According to the release agreement and the note, release credits were not to be applied towards principal payments due under the note. The trial court erroneously concluded that BSDC was entitled to apply release credits towards the November principal payment, and that default under the note occurred in May of 1994. We find that BSDC was required to make a principal payment in November of 1993, and BSDC's failure to make the November payment constituted default under the note. We therefore affirm the conclusion and finding of the trial court as modified.

Affirmed.

Judges JOHN and McGEE concur.

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

GAYE A. HIEB, EMPLOYEE/PLAINTIFF/APPELLEE, v. HOWELL'S CHILD CARE CENTER, INC., EMPLOYER, AND ST. PAUL FIRE & MARINE INSURANCE COMPANY, CARRIER/DEFENDANTS/APPELLANTS

No. COA95-766

(Filed 2 July 1996)

1. Workers' Compensation § 85 (NCI4th)— disbursement of third-party proceeds—jurisdiction in Commission—motion to stay execution of superior court order—no jurisdiction in Commission

Although the Industrial Commission, not the superior court, had jurisdiction to disburse third-party proceeds in this case, such jurisdiction did not extend over a motion to stay execution of a superior court order.

Am Jur 2d, Workers' Compensation § 451.

2. Workers' Compensation § 102 (NCI4th)— payment of benefits stopped without approval—authority of Commission to order resumption

The Industrial Commission had continuing jurisdiction to order resumption and repayment of workers' compensation benefits after defendants stopped payment without proper approval and in violation of Workers' Compensation Rule 404 where lifetime benefits had been awarded pursuant to an approved Industrial Commission Form 26 agreement. N.C.G.S. §§ 97-18(g), 97-88.

Am Jur 2d, Workers' Compensation § 56.

3. Workers' Compensation §§ 219, 476 (NCI4th)— penalty for amounts past due—award of costs—authority of Commission

Pursuant to N.C.G.S. §§ 97-18(g), 97-88, and 97-88.1, the Industrial Commission had the authority to order defendants to pay a 10% penalty against all amounts past due and to order defendants to pay costs, including attorney's fees, where the Commission found defendants in violation of Commission rules by terminating disability and medical compensation without the Commission's approval and by refusing to resume immediate payments following a deputy commissioner's order, and the

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

Commission concluded that defendants brought this claim without reasonable grounds.

Am Jur 2d, Workers' Compensation §§ 443, 444, 722-726.

Appeal by defendants from Opinion and Award entered 12 May 1995 by the Full Industrial Commission. Heard in the Court of Appeals 25 March 1996.

On 17 October 1989 plaintiff was driving a vehicle for her employer, Howell's Child Care Center, when she was struck by another vehicle driven by Woodrow Lowery. As a result of the accident, she suffered numerous compensable injuries, including severe brain damage. The workers' compensation insurance carrier for Howell's, defendant St. Paul Fire & Marine Insurance Company, conceded that plaintiff was permanently and totally disabled.

The insurance policies in effect were Lowery's liability policy issued by Integon Indemnity Company, with a limit of \$25,000.00 per person, an underinsured motorist policy of \$500,000.00 per accident, issued by Hartford Accident and Indemnity Company, and workers' compensation coverage issued by St. Paul.

Plaintiff and her husband filed suit against Lowery in Mecklenburg County Superior Court (90-CVS-10760), and soon afterwards filed a second action against St. Paul and Hartford to determine the respective rights of the parties to benefits provided by the Hartford UIM policy and to determine the amount of coverage available (91-CVS-3263). In the second action, Judge Robert P. Johnston entered an order pursuant to N.C. Gen. Stat. § 97-10.2 (1991) determining that (1) Hartford was allowed to reduce its UIM coverage limits by any amounts paid or to be paid to Mrs. Hieb or on her behalf by St. Paul as workers' compensation benefits and (2) St. Paul was entitled to a workers' compensation lien against all amounts paid or to be paid to Mrs. Hieb by Hartford pursuant to its UIM coverage. Plaintiffs appealed the order to this Court.

Meanwhile, in the civil suit against Lowery, the jury awarded plaintiff \$1,279,000.00. On 20 November 1992 Judge Robert E. Gaines entered a judgment on the verdict and in accordance with Judge Johnston's order. Judge Gaines also ordered defendants to pay, as attorney's fees, 33.33% of all amounts paid to St. Paul from any UIM policy and directed disbursement of the third party proceeds pursuant to G.S. § 97-10.2.

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

On 2 November 1993, this Court issued an opinion in the appeal of Judge Johnston's order, reversing that portion of the order allowing Hartford to reduce its limits, and affirming that portion of the order allowing defendant St. Paul to assert a workers' compensation lien against the UIM benefits. *See Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 435 S.E.2d 826 (1993) (*Hieb I*).

Subsequently, plaintiff and defendants could not agree on the distribution of the third party recovery, and in March 1994 plaintiff filed a motion in Mecklenburg County Superior Court to modify and enforce Judge Gaines's judgment, and set the workers' compensation lien. On 14 July 1994 Judge Claude S. Sitton allowed the motion, concluding

1. That this Court has jurisdiction over the parties and subject matter of this action and has the authority to enter the following Order.
2. That because Lowery has been released of personal liability and all liability insurance policies have been exhausted the Hartford UIM policy proceeds are the only source of funds available to satisfy the subrogation lien of St. Paul and to satisfy the Judgments in favor of Plaintiffs.
3. That the Hartford policy proceeds of \$475,000 are insufficient to compensate the subrogation lien of St. Paul and to satisfy the Judgments in favor of Plaintiffs.
4. That the Court should exercise its discretion under the provisions of North Carolina General Statute Section 97-10.2 to determine the amount of St. Paul's workers' compensation lien.
5. That the sum of \$241,677.77 is fair and equitable for St. Paul to receive in satisfaction of its workers' compensation lien.
6. That it is fair and equitable for the balance of the Hartford UIM proceeds [to] be paid to the Plaintiffs.

Judge Sitton ordered distribution of the funds accordingly and awarded attorney's fees based on the terms of Judge Gaines's November 1992 judgment.

Defendant St. Paul appealed to this Court, arguing that Judge Sitton did not have authority to enter the 14 July 1994 order. We agreed, holding that G.S. § 97-10.2(j) was not applicable to confer jurisdiction over distribution of the third party proceeds on a superior

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

court judge. *See Hieb v. Lowery*, 121 N.C. App. 33, 464 S.E.2d 308 (1995) (*Hieb II*).

On 12 August 1994, however, while the appeal of Judge Sitton's order was pending in this Court, St. Paul contacted all of plaintiff's treating physicians and advised them that it would no longer pay plaintiff's medical expenses. In addition, St. Paul stopped paying plaintiff her permanent and total disability compensation. On 24 August 1994, *after* ceasing all payments, St. Paul filed a Form 24 Application to Stop Payment with the Industrial Commission.

Defendants also filed with the Commission motions to stop payment of compensation and to stay distribution of third party proceeds. Deputy Commissioner Tamara R. Nance entered an order on 4 October 1994, finding that because Judge Sitton's order was currently on appeal to this Court, the Commission did not have jurisdiction to "effectively overrule" the order. She denied defendants' motions and ordered them to immediately resume medical payments and compensation. She also denied defendants' Form 24 Application to Stop Payment.

On appeal, the Full Commission concluded that it did not have jurisdiction over the disbursement of the third party funds because such action in this case fell under N.C. Gen. Stat. § 97-10.2(j), pursuant to which a superior court has exclusive jurisdiction. The Commission also concluded that whether Judge Sitton's exercise of discretion was appropriate was properly on appeal to this Court and was not for the Commission to decide.

The Commission found that defendants clearly admitted they had no authority to terminate compensation without the approval of the Industrial Commission, but they did not resume payments following the deputy commissioner's order. The Commission censured defendants for their actions, commenting that their "position cannot be condoned from a legal standpoint despite any practical implications, and defendants' pursuit of their position has been unreasonable at the very least." Moreover, the Commission concluded:

4. The undersigned find defendants' actions to stop payment (pursuant to an approved Form 26 for lifetime benefits) without obtaining Industrial Commission approval and in open, continued defiance of Industrial Commission rules and orders is reprehensible, unjustified, and cannot go without comment. Defendants have blatantly ignored the Rules of the Industrial Commission

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

and have refused to abide by statutory law. They have broken the law and defendants' counsel boldly proclaimed to the Industrial Commission that she advised her client to pursue this action. The Industrial Commission will not tolerate this type of abuse.

5. It is clear that there was no authority to terminate or suspend plaintiff's workers' compensation and *medical* benefits while plaintiff is still disabled as a result of a compensable injury. Defendants not only stopped disability compensation to plaintiff but, upon advice of counsel, also refused to provide medical services. Defendants' conduct is egregious, reprehensible, and unlawful. A motion to stop payment after payment has been stopped, which is grounded in no authority under the law, is nothing more than an attempt to use the Industrial Commission to legitimize unlawful actions already taken by defendants. This is further abuse of the workers' compensation system. One who seeks equity must have "clean hands."

The Commission noted that defendants could have requested a stay of execution in superior court rather than independently stopping payment.

In its award, the Commission ordered defendants to pay immediately all accrued amounts of medical and disability compensation plus interest and to continue making payments pending the outcome of an appeal to this Court. The Commission also ordered defendants to pay a ten percent penalty on all past due amounts owed to plaintiff and a reasonable attorney's fee of \$4,000.00 for bringing the claim "without reasonable grounds."

Commissioner Dianne C. Sellers dissented on the issue of the Commission's jurisdiction over the distribution of third party funds but concurred in the Full Commission's conclusion that defendants should resume payments, pay a ten percent penalty for late payment, and pay interest on amounts accrued, subject to their appeal rights.

Defendants now appeal the Opinion and Award of the Full Commission.

*Charles G. Monnett III & Associates, by Charles G. Monnett III,
for plaintiff appellee.*

*Russell & King, P.A., by Sandra M. King, for defendant
appellants.*

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

ARNOLD, Chief Judge.

[1] Defendants argue that the Commission has exclusive jurisdiction over disbursement of the third party proceeds and therefore erred in not staying Judge Sitton's order of distribution. Although defendants are correct in asserting that the Commission has exclusive jurisdiction over disbursement of the third party proceeds in this case, it does not follow that the Commission has the authority to stay a superior court order, even if that order were in error.

Under the Workers' Compensation Act, recovery from a third party tortfeasor is generally distributed by the Industrial Commission pursuant to N.C. Gen. Stat. § 97-10.2(f) (1991). An exception to this rule is provided in G.S. § 97-10.2(j), which grants jurisdiction over distribution of third party proceeds to a superior court judge "in the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier."

Acting under the apparent authority of this provision, Judge Sitton assumed jurisdiction over the matter and ordered distribution of the third party proceeds. Defendant St. Paul appealed Judge Sitton's order, arguing that Judge Sitton had no jurisdiction under G.S. § 97-10.2(j) to modify Judge Johnston's judgment. *Hieb v. Lowery*, 121 N.C. App. 33, 464 S.E.2d 308 (1995) (*Hieb II*). Because the third party judgment exceeded the subrogation claim of the workers' compensation insurance carrier, this Court agreed and held that G.S. § 97-10.2(j) was inapplicable, even if the actual proceeds of the judgment were insufficient to compensate the subrogation claim. "Giving the statute its plain meaning, requires us to read the term 'judgment' to mean just that, and to reject plaintiffs' argument that we should look only at the insurance 'proceeds' that Mrs. Hieb is to receive in determining the applicability of section 97-10.2(j)." *Id.* at 38, 464 S.E.2d at 311.

Thus, the Industrial Commission, not the superior court, has exclusive jurisdiction over distribution of the proceeds recovered from the third party tortfeasor in this case. Without the benefit of our decision in *Hieb II*, the Commission erred in finding that it did not have jurisdiction over the disbursement of the third party funds. This issue, however, is secondary to the appeal here. The only issue we address is whether the Commission had jurisdiction to stay Judge Sitton's order.

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

Rule 62 of the North Carolina Rules of Civil Procedure governs stays of proceedings to enforce judgments and provides that when an appeal is taken, the appellant may obtain a stay of execution by acting in accordance with and subject to G.S. §§ 1-289, -290, -291, -292, -293, -294, and -295. N.C. Gen. Stat. § 1A-1, Rule 62(d) (1990). Section 1-289 addresses stays of execution on money judgments and provides:

If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. . . . The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from

Defendants did not pursue a stay under Rule 62(d) and G.S. § 1-289, instead improperly filing a motion with the Commission. Although we found in *Hieb II* that the Commission, not the superior court, has jurisdiction to disburse third party proceeds in this case, such jurisdiction does not extend over a motion to stay execution of a superior court's order. The Full Commission correctly declined to stay Judge Sitton's order.

[2] Defendants next contend that the Full Commission erred in ordering them to resume payment of medical and compensation benefits immediately, to pay all past due accrued amounts, and to continue making payments pending the outcome of the instant appeal to this Court. We disagree.

Defendants argue that G.S. § 97-86.1(a) and (b) are the sole provisions authorizing the Commission to order payment of compensation during the pendency of an appeal, and that these provisions are inapplicable here. While we agree that neither G.S. § 97-86.1(a) nor (b) applies in this case, we find that the Commission did have the authority to order resumption and repayment of workers' compensation benefits after defendants stopped payment without proper approval and in violation of Workers' Compensation Rule 404.

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

The Industrial Commission has continuing jurisdiction over all proceedings begun before it for compensation in accordance with its terms. *Butts v. Montague Bros.*, 208 N.C. 186, 188, 179 S.E. 799, 801 (1935). In other words, "it is clothed with such implied power as is necessary to perform the duties required of it by the law which it administers." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985).

In *Hogan*, the Supreme Court found that the Commission has the power to set aside one of its former judgments—a "judicial power conferred on the Commission by the legislature and [] necessary to enable the Commission to supervise its own judgments." *Id.* Because "it is apparent that the Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act," *id.* at 138, 337 S.E.2d at 483, it follows that the Commission's continuing jurisdiction over its judgments includes the power to supervise and enforce them. The fact that the lifetime benefits in this case were awarded pursuant to an approved Industrial Commission Form 26 agreement rather than a judgment does not preclude the Commission's jurisdiction to enforce that agreement. *See Tabron v. Farms, Inc.*, 269 N.C. 393, 396, 152 S.E.2d 533, 535 (1967) (observing that the Commission's jurisdiction is invoked when either a compensation claim is filed or a voluntary settlement is submitted for approval).

The Commission's continuing jurisdiction over compensation awards is revealed in G.S. § 97-18(g) (1995), which provides:

If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

This section recognizes not only the Commission's power to order a penalty for unpaid installments, but also its power to enforce payment of the late installment itself. The Commission's authority to order an insurer "to make, or to continue payments of benefits, including compensation for medical expenses," is also contemplated in G.S. § 97-88, which governs expenses of appeals brought by insurers. Considering the fact that defendants stopped payment without

HIEB v. HOWELL'S CHILD CARE CENTER

[123 N.C. App. 61 (1996)]

proper approval, the Full Commission clearly had authority to enforce the Form 26 agreement and order them to resume payments and pay their past due installments.

[3] Finally, defendants argue that the Commission erred in ordering a ten percent penalty against all amounts past due and in ordering them to pay costs, including plaintiff's attorney's fees. The Commission clearly had statutory authority to order a ten percent penalty against all amounts past due pursuant to G.S. § 97-18(g). We are not persuaded by defendants' attempt to distinguish this provision.

The Full Commission's authority to order defendants to pay costs, including attorney's fees, derives from G.S. §§ 97-88 and -88.1. Section 97-88 allows the Commission to award attorney's fees for an insurer's appeal to the Full Commission in which the insurer is ordered to make or continue payments of benefits, and G.S. § 97-88.1 states:

If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

The Full Commission awarded attorney's fees upon finding defendants in violation of Industrial Commission rules by terminating compensation without the Commission's approval, and by refusing to resume immediate payments following the deputy commissioner's order. We find sufficient evidence to support the Full Commission's conclusion that defendants brought this claim without reasonable grounds, and its decision to award reasonable attorney's fees was appropriate. *See Robinson v. J. P. Stevens*, 57 N.C. App. 619, 627-28, 292 S.E.2d 144, 149 (1982).

Affirmed.

Judges MARTIN, John C., and SMITH concur.

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

ROBERT ALLEN CONNER, PLAINTIFF-APPELLEE v. CONTINENTAL INDUSTRIAL
CHEMICALS, INC. & ROBERT WYATT, DEFENDANTS-APPELLANTS

No. COA95-1076

(Filed 2 July 1996)

1. Negligence § 33 (NCI4th)— forklift accident—sudden emergency—instruction proper

In an action to recover for injuries sustained by plaintiff when he was hit by a forklift driven by defendant's employee, the evidence was sufficient to support the trial court's instruction on sudden emergency where it tended to show that the employee was using excessive speed and "acted like he was mad" when he drove the forklift into the trailer which plaintiff truck driver had delivered to defendant's premises; as a result plaintiff attempted to walk away from the forklift because he feared for his safety and wanted to get as far away from the employee as he could; however, as plaintiff turned to look around to see the location of the forklift, it was already approaching him at a rapid speed; and plaintiff screamed for the employee to stop, but the forklift hit him.

Am Jur 2d, Negligence §§ 899-902.**2. Negligence § 170 (NCI4th)— contributory negligence—duty to choose safe way to do job—refusal to instruct**

In an action to recover for injuries sustained by plaintiff truck driver when he was struck by a forklift driven by a warehouse employee while unloading the truck, the trial court did not err by refusing to give the jury a contributory negligence instruction on plaintiff's duty to choose a safe way to do his job, which would have been to stand on the dock beside the truck, where the court instructed on the law of contributory negligence and on plaintiff's duty to keep a proper lookout.

Am Jur 2d, Negligence §§ 1108 et seq.

Propriety and prejudicial effect of instructions referring to the degree or percentage of contributory negligence necessary to bar recovery. 87 ALR2d 1391.

3. Damages § 173 (NCI4th)— truck driver—lost earnings—instructions—time license suspended

The trial court did not err by refusing to instruct the jury that it could not measure any wage loss plaintiff truck driver may have

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

suffered during the time his license was suspended for one year where plaintiff's expert witness excluded this period of time from his calculations as to plaintiff's loss of income, and plaintiff did not claim loss of income for this time period as part of his damages.

Am Jur 2d, Damages § 1015.**4. Damages § 173 (NCI4th)— lost earnings—failure to work when capable—instruction not required**

The trial court did not err by refusing to instruct the jury that a person who is capable of working but does not do so may not recover for the loss of any amount he was capable of earning where plaintiff testified that he sought employment after his injury and in fact had periods of employment, and the court's instruction on reduced capacity to earn gave the substance of defendant's requested instruction.

Am Jur 2d, Damages § 1015.**5. Handicapped, Disabled, or Aged Persons § 29 (NCI4th)— persons with disabilities—prohibition of employment discrimination—instruction not required**

The trial court did not err by refusing to instruct that the jury should be aware that employers cannot discriminate against persons with disabilities and in some circumstances are required to make reasonable accommodations for those disabilities where nothing in the record indicated that plaintiff had ever been denied employment because of his disability.

Am Jur 2d, Job Discrimination §§ 173 et seq.

Availability of private right of action under sec. 503 of Rehabilitation Act of 1973 (29 USCS sec. 793), providing that certain federal contracts must contain provision requiring affirmative action to employ qualified handicapped individuals. 60 ALR Fed. 329.

6. Evidence and Witnesses § 1946 (NCI4th)— drug test as business record—stipulation—no complaint as to proper foundation

Defendants' stipulation that a report of defendant employee's post-accident drug test was authentic and a business record made in the ordinary course of business precluded defendants from

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

complaining on appeal that plaintiff did not lay a proper foundation and that the report was hearsay.

Am Jur 2d, Evidence §§ 1290-1297, 1300-1315.**7. Evidence and Witnesses § 2217 (NCI4th)— expert testimony—qualification of expert**

There was no merit to defendants' contention that the trial court erred in admitting a doctor's opinion that defendant employee was impaired by cocaine at the time of the accident in question because the doctor was not qualified to express such an opinion, since there was ample evidence in the record to support the trial court's qualification of the witness as an expert.

Am Jur 2d, Expert and Opinion Evidence §§ 53-67; Witnesses §§ 163, 190, 197, 277.

Appeal by defendants from judgment entered 9 March 1995 and order entered 13 April 1995 by Judge Claude S. Sitton in Gaston County Superior Court. Heard in the Court of Appeals 21 May 1996.

Arthurs & Foltz, by Douglas P. Arthurs, and Gray & Hodnett, by James C. Gray, for plaintiff-appellee.

Cansler, Lockhart, Campbell, Evans, Bryant & Garlitz, P.A., by Thomas D. Garlitz, for defendants-appellants.

WYNN, Judge.

On 29 December 1992, plaintiff Robert Allen Conner, a truck driver employed by Carolina Freight Carriers, delivered chemicals to defendant Continental Industrial Chemical Inc.'s ("Continental") warehouse. In the process of unloading that truck at the warehouse, Continental's employee, defendant Robert Wyatt, backed a forklift into Mr. Conner. As a result of the accident, Mr. Conner suffered a fractured left foot, a crush injury to the soft tissue of the same foot, injury to his right knee, and bruising on his left leg.

Mr. Conner sued defendants for damages arising from the personal injuries that he sustained as a result of the accident. Defendants, on the other hand, alleged that Mr. Conner had been contributorily negligent as a matter of law because he did not look before entering and crossing the area where the forklift was being operated.

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

After trial, a jury found Mr. Wyatt negligent, found Mr. Conner not contributorily negligent, and awarded Mr. Conner \$300,000 in damages. The trial court entered judgment on these verdicts and denied defendants' motion for judgment notwithstanding the verdict. Defendants appealed.

Defendants contend that the trial court erred by (I) instructing the jury on the doctrine of sudden emergency, (II) refusing to properly instruct the jury on plaintiff's duty to choose a safer method to do his job, lost wages, plaintiff's efforts to find employment after his injury and an employer's duty to hire disabled workers, (III) admitting the report of defendant Wyatt's post-accident drug test, (IV) admitting expert testimony that defendant Wyatt was impaired by cocaine at the time of the accident, and (V) failing to find that plaintiff was contributorily negligent as a matter of law. We address each contention in turn and conclude that the trial was free from error.

I.

[1] Defendants first argue that the trial court erred by instructing the jury on the doctrine of sudden emergency because no sudden emergency existed at the time of the accident. We disagree.

It is error to instruct the jury on the doctrine of sudden emergency when the evidence viewed in the light most favorable to the party claiming the benefit of the doctrine would not support a finding of the existence of a sudden emergency that was not of that party's making. *Masciulli v. Tucker*, 82 N.C. App. 200, 206, 346 S.E.2d 305, 308-09 (1986). The sudden emergency doctrine allows the court to "explain to the jury the effect certain external forces have on whether a duty of care has been breached." *Bolick v. Sunbird Airlines, Inc.*, 96 N.C. App. 443, 448, 386 S.E.2d 76, 79 (1989), *aff'd*, 327 N.C. 464, 396 S.E.2d 323 (1990). Two requirements must be met before this doctrine applies. First, an emergency situation must exist requiring immediate action to avoid injury. *Masciulli*, 82 N.C. App. at 206, 346 S.E.2d at 308-09. Second, the emergency must not have been created by the negligence of the party seeking the protection of the doctrine. *Id.*; *Colvin v. Badgett*, 120 N.C. App. 810, 463 S.E.2d 778 (1995), *aff'd per curiam*, 343 N.C. 300, 469 S.E.2d 553 (1996). The theory of sudden emergency applies equally to the alleged negligence of the defendant and the alleged contributory negligence of the plaintiff. *See Hamilton v. Josey*, 272 N.C. 105, 157 S.E.2d 619 (1967).

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

Viewing the evidence in the light most favorable to the plaintiff, *Bolick*, 96 N.C. App. at 448, 386 S.E.2d at 79 (stating that in determining whether an instruction is required, evidence must be viewed in light most favorable to proponent), the record on appeal indicates that defendant Wyatt "was using excessive speed . . ." and that "[h]e acted like he was mad" when he drove into the trailer on the forklift. As a result, Mr. Conner attempted to walk away from the forklift because he feared for his safety and "wanted [to get] as far away from [defendant] as [he] could get." However, as Mr. Conner turned to look around to see the location of the forklift, the forklift was already approaching him at a rapid speed. Plaintiff screamed for the defendant to stop, but the forklift hit him.

We find that this evidence was sufficient for the trial court to instruct the jury on the sudden emergency doctrine. The rule is well established "that when a plaintiff is required to act suddenly and in the face of real, or under a reasonably well-founded apprehension of, impending and imminent danger to himself caused by defendant[s] negligence . . . he is not required to act as though he had time for deliberation and the full exercise of his judgment and reasoning faculties." *Rodgers v. Thompson*, 256 N.C. 265, 273, 123 S.E.2d 785, 790 (1962). We therefore find no error in the trial court's instruction.

II.

Defendants next contend that the trial court erred by refusing to instruct the jury that: (1) Plaintiff was contributorily negligent because he did not choose a safer method to do his job; (2) the jury could not measure any wage loss Mr. Conner may have suffered during the time his license had been suspended for one year (which coincided with the time of plaintiff's accident); (3) the jury may not allow a person who is capable of working, but does not do so, to recover for the loss of any amount he was capable of earning; and that (4) the jury should be aware that employers cannot discriminate against persons with disabilities and in certain circumstances, they are required to make reasonable accommodations for those disabilities.

When a party tenders a written request for a special instruction that is correct in itself and supported by the evidence, a trial court commits reversible error if it does not give the instruction *at least in substance*. *Millis Construction Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 509-10, 358 S.E.2d 566, 568 (1987).

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

[2] In the instant case, defendants requested that the trial court instruct the jury that plaintiff was contributorily negligent because he did not choose a safer method to do his job which would have been to stand on the dock beside the truck.

Under North Carolina law, a plaintiff is contributorily negligent if the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for his own safety. *Rone v. Byrd Food Stores*, 109 N.C. App. 666, 670, 428 S.E.2d 284, 286 (1993).

The trial judge gave the following instruction in pertinent part:

If the plaintiff's negligence joins with the negligence of the defendant in proximately causing the plaintiff's own injury, it is called contributory negligence and the plaintiff cannot recover . . . I instruct you that contributory negligence is not to be presumed from the mere fact of injury. As to the contention of keeping a proper lookout, members of the jury, I instruct you that a person making a delivery to a place has a duty to maintain a lookout for his own safety while at said place A person on foot must keep a reasonable lookout as a reasonably careful and prudent person A pedestrian who does not take those precautions does not exercise reasonable care, and a violation of this duty is contributory negligence.

We find no error in this instruction. Indeed, the trial court instructed the jury on the law of contributory negligence. As such, the trial court did not err in refusing to instruct on plaintiff's duty to choose a safer way to do his job.

[3] With regard to defendants' second requested instruction that the jury could not measure any wage loss plaintiff may have suffered during the time his license had been suspended for one year, we find this argument to be without merit. The record shows that the trial court gave the following instruction:

Damages for personal injury also include fair compensation for the loss of income from employment, loss from inability to perform ordinary labor or the reduced capacity to earn money experienced by the plaintiff—as a consequence of his injury. In determining this amount, you should consider the evidence as to the plaintiff's age and occupation; the nature and extent of the plaintiff's employment; the value of the plaintiff's services; the amount of plaintiff's income at the time of his injury from fixed salary or wages; the disability, if any, affecting earning capacity. Those

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

things are to be considered by you. The plaintiff's damages also include the amount by which his future earnings will be reduced as a consequence of his injury. In determining this amount, you may consider any evidence in regard to past earnings and any evidence as to the loss of future earning capacity.

This instruction is the pattern jury instruction on loss of income, past and future.

At trial, plaintiff's economic expert, Dr. Finley Lee, excluded the period of time when plaintiff's license had been suspended from his calculations as to plaintiff's loss of income. Significantly, plaintiff did not claim loss of income for this time period. Therefore, it would have been erroneous to instruct the jury to reduce the award by an amount not claimed by the plaintiff.

[4] Additionally, the trial court did not err in rejecting defendants' third requested instruction emphasizing plaintiff's efforts to find employment after his injury. Plaintiff testified at trial that he sought employment after his injury and in fact, had periods of employment. This evidence was before the jury to consider. As such, the instruction given to the jury that "[d]amages . . . include fair compensation for the loss of income from employment, loss from inability to perform ordinary labor or *the reduced capacity to earn money experienced by the plaintiff—as a consequence of his injury*" was correct and gave the substance of defendants' requested instruction. (emphasis supplied); *See Millis Construction Co.*, 86 N.C. App. at 509-10, 358 S.E.2d at 568.

[5] Finally, we find no merit in defendants' fourth requested instruction concerning the duties of potential employers to hire disabled workers. This proffered instruction was clearly not supported by the evidence at trial. *See Millis Construction Co.*, 86 N.C. App. at 509-10, 358 S.E.2d at 568. Nothing in the record indicates that plaintiff had ever been denied employment because of his disability.

In sum, we find that the trial court did not err in refusing to give these instructions.

III.

[6] Defendants next contend that the trial court erred in admitting the report of defendant Wyatt's post-accident drug test because plaintiff did not lay a proper foundation and because the report was inadmissible hearsay. We disagree.

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

We note at the outset that prior to trial, defendants stipulated to the authenticity of the drug test results as a business record. N.C.R. Evid. 901(a) (1996) provides that the authentication of a matter “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Additionally, N.C.R. Evid. 803(6) (1996) provides that business records kept in the ordinary course of business are admissible as exceptions to the hearsay rule.

By stipulating that the report was authentic and a business record made in the ordinary course of business at Roche Biomedical Laboratories, defendants cannot now argue on appeal that plaintiff did not lay a proper foundation and that the report was hearsay. Specifically, the trial court found that the parties’ stipulations concerning the report satisfied any foundation or hearsay exception requirements. As such, all other objections to the test results must go the *weight* of the evidence. *See State v. Miller*, 80 N.C. App. 425, 430, 342 S.E.2d 553, 556, *cert. denied*, 317 N.C. 711, 347 S.E.2d 448 (1986).

Accordingly, we find these arguments to be without merit.

IV.

[7] Defendants also contend that the trial court erred in admitting Dr. Steven Tracy’s opinion that defendant Wyatt was impaired by cocaine at the time of the accident because Dr. Tracy was not qualified to express such an opinion and that the testimony’s probative value was substantially outweighed by risks that it would unfairly prejudice defendants and mislead the jury. We disagree.

For expert testimony to be admissible, the witness need only be better qualified than the jury as to the subject at hand, and the witness’ testimony must be helpful to the jury. *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *cert. denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). A finding by the trial judge that the witness qualifies as an expert is exclusively within the discretion of the trial judge and is not to be reversed on appeal absent a complete lack of evidence to support his ruling. *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *cert. denied*, 316 N.C. 198, 341 S.E.2d 581 (1986).

In the instant case, there was ample evidence to support the trial court’s qualification of Dr. Tracy as an expert. Dr. Tracy testified as to his training and experience in toxicology and forensic pathology. He also testified that he had read the deposition and statement of defendant Wyatt, portions of the deposition of the plaintiff, and depositions

CONNER v. CONTINENTAL INDUSTRIAL CHEMICALS

[123 N.C. App. 70 (1996)]

of several other witnesses. Additionally, Dr. Tracy consulted with Dr. Anderson, Chief Toxicologist at the University of North Carolina-Chapel Hill Medical Examiner's Office, and read several text books regarding cocaine prior to giving his testimony.

Finding no abuse of discretion in the trial court's qualification of Dr. Tracy, we conclude that the trial court did not err in allowing Dr. Tracy to give his expert opinion that defendant Wyatt had been impaired by cocaine at the time of the accident. Dr. Tracy was better qualified than the jury on this subject, and his testimony was helpful to the jury. *See State v. Davis*, 106 N.C. App. at 601, 418 S.E.2d at 267. Additionally, we find no merit in the argument that the trial court erred in admitting Dr. Tracy's testimony because its probative value was substantially outweighed by risks that it would unfairly prejudice defendants and mislead the jury.

V.

Defendants' last contention is that the trial court erred in denying their motion for judgment notwithstanding the verdict because plaintiff was contributorily negligent as a matter of law. We disagree.

A judgment notwithstanding the verdict is proper only if the evidence taken in the light most favorable to the plaintiff establishes that *no other reasonable inference can be drawn*. *Allen v. Pullen*, 82 N.C. App. 61, 64, 345 S.E.2d 469, 472 (1986), *cert. denied*, 318 N.C. 691, 351 S.E.2d 738 (1987).

Viewing the evidence in the light most favorable to plaintiff, the record on appeal indicates that while plaintiff tried to move away from the forklift, the forklift hit him from behind. In explaining his lookout, plaintiff testified, "I did the very best I could The only time I turned away from him was trying to get away from him." Based on this testimony and our discussion in Part I of this opinion on the issues of sudden emergency and contributory negligence, we find that the trial court did not err in denying defendants' motion for judgment notwithstanding the verdict.

The trial court's judgment and order is,

Affirmed.

Judges EAGLES and SMITH concur.

MOSELEY v. L & L CONSTRUCTION, INC.

[123 N.C. App. 79 (1996)]

ROY J. MOSELEY, JR. AND WIFE, CYNTHIA T. MOSELEY v. L & L CONSTRUCTION, INC.; ROBERT A. WOLFE; EDWARD McDONALD OLLIS, AND COUNTY OF BURKE

No. COA95-1117

(Filed 2 July 1996)

Building Codes and Regulations § 46 (NCI4th); Municipal Corporations § 450 (NCI4th)— negligence of building inspector alleged—failure of plaintiffs to show special relationship or special duty—negligence action properly dismissed

The trial court properly dismissed plaintiffs' negligence action against defendant county building inspector and defendant county where plaintiffs alleged that defendants were negligent in various respects in the inspection of their residence during construction, including the failure to locate and require correction of numerous building code violations and structural defects and failure to advise plaintiffs that the house was structurally unsound and unfit for occupation, since a showing that a municipality has undertaken to perform its duties to enforce safety statutes like the North Carolina State Building Code is not sufficient by itself to show the creation of a special relationship with particular individual citizens, and plaintiffs did not show that a special relationship or a special duty was created between them and defendants; furthermore, the court properly dismissed plaintiffs' claim of willful and wanton conduct on the part of defendant building inspector where they alleged no additional facts to support that claim.

Am Jur 2d, Buildings §§ 32-38; Municipal, County, School and State Tort Liability §§ 184 et seq.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances. 38 ALR4th 1194.

Appeal by plaintiffs from order entered 1 September 1993 by Judge Robert E. Gaines in Burke County Superior Court. Heard in the Court of Appeals 22 May 1996.

Plaintiffs purchased a house in a subdivision known as High Timbers 31 May 1988. What appeared to be natural settling of the house occurred from 1988-89. In late 1990 evidence of extensive dam-

MOSELEY v. L & L CONSTRUCTION, INC.

[123 N.C. App. 79 (1996)]

age as a result of the settling of the house surfaced. The roof began to sag, walls began to crack and bow, and water and sewer lines began to leak and to pond in the crawl space under the house.

In December 1990 the Burke County Health Department and Building Code Administrator separately notified plaintiffs that the residence was in violation of state laws for not meeting requirements with respect to the broken water and sewer pipes and with respect to the structural integrity of the residence. The County Building Code Administrator also included notice that the house would be condemned if necessary remedial action was not taken. A subsequent investigation by consultants disclosed that the house had been built on soft to firm fill, without adequate structural compaction, and that there was a volume of stumps, roots and other organic material in the fill. Under separate investigation, the consultants determined that the house was improperly wired, was never grounded and that the septic tank had been improperly installed. Plaintiffs ultimately had to move out of the house and rent another house in Valdese, North Carolina.

Plaintiffs alleged that defendant Ollis was a building inspector employed by defendant Burke County, and that defendant Burke County's Building Inspection Section issued a permit for construction to L & L Construction, Inc. for the construction of the house which was purchased by plaintiffs. Also alleged was that defendant Ollis purported to perform inspections required by law during construction of the house, including without limitation inspection of the foundation, electrical systems and sanitation systems and that Ollis issued a certificate of final inspection and occupancy for the house. Thereafter, the property changed hands several times before the plaintiffs purchased it in 1988. Plaintiffs alleged that Ollis undertook to perform inspections and failed to use due, reasonable, or proper care and skill in performing the inspections. Furthermore, plaintiffs alleged that Burke County has insurance coverage and may be held liable to plaintiffs for damages sustained by them through the misrepresentations or conduct of Ollis.

The Honorable Robert E. Gaines allowed defendants Ollis and Burke County's motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs gave notice of appeal. On 28 December 1993, the defendants made a motion to dismiss appeal alleging that the order from which plaintiffs sought to appeal was interlocutory and not appealable at the time. The Court of Appeals allowed the motion. Plaintiffs filed a voluntary dismissal without prej-

MOSELEY v. L & L CONSTRUCTION, INC.

[123 N.C. App. 79 (1996)]

udice as to defendants L & L Construction, Inc. and Robert A. Wolfe. Plaintiffs then gave notice of appeal to the Court of Appeals 17 July 1995.

Mitchell, Blackwell & Mitchell, P.A., by Hugh A. Blackwell, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, P.L.C., by Allan R. Gitter and Robert S. Pierce, for defendant appellees.

ARNOLD, Chief Judge.

Plaintiffs first argue that the trial court erred in granting defendants Ollis and Burke County's motion to dismiss for failure to state a claim upon which relief could be granted. We disagree.

The applicable standard of review of a Rule 12(b)(6) ruling is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint "unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

Plaintiffs' primary claim against defendants Ollis and Burke County is negligence. Plaintiffs sought relief upon the negligence of Ollis and the imputed negligence of his employer, Burke County. Plaintiffs alleged that Ollis undertook to perform inspections on the dwelling in question for the purpose of insuring the safety and security of potential owners of the dwelling and did so without using due care.

Plaintiffs cited the following statutes to support their negligence theory:

N.C. Gen. Stat. § 153A-352 (1991). Duties and responsibilities [of the inspection department and of inspectors within each county as they relate to the construction of buildings, the installation of facilities, and the maintenance of buildings in a safe sanitary and healthful condition]

N.C. Gen. Stat. § 153A-360 (1991). Inspections of work in progress. As the work pursuant to permit progresses, local

MOSELEY v. L & L CONSTRUCTION, INC.

[123 N.C. App. 79 (1996)]

inspectors shall make as many inspections of the work as may be necessary to satisfy them that it is being done according to the provisions of the applicable State and local laws and local ordinances and regulations and of the terms of the permit.

N.C. Gen. Stat. § 153A-363 (1991). Certificates of Compliance. At the conclusion of all work done under a permit, the appropriate inspector shall make a final inspection. If he finds that the completed work complies with all applicable State and local laws and local ordinances and regulations and with the terms of the permit, he shall issue a certificate of compliance.

N.C. Gen. Stat. § 153A-356 (1991). If a member of an inspection department willfully fails to perform the duties required of him by law, or willfully improperly issues a permit, or gives a certificate of compliance without first making the inspections required by law, or willfully improperly gives a certificate of compliance, he is guilty of a misdemeanor.

This Court recently addressed whether N. C. Gen. Stat. § 160A-411 (1994) *et seq.* and the North Carolina Building Code were safety statutes, intended to promote the safety of the general public. *Sinning v. Clark*, 119 N.C. App. 515, 519, 459 S.E.2d 71, 74, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995). The plaintiffs in *Sinning* sought compensatory and punitive damages against the City of New Bern and two of its employees in their official capacities as Administrator for the City's Inspection Department, and a building inspector holding a Level III standard inspection certificate in building, electrical, mechanical and plumbing. *Id.* at 516, 459 S.E.2d at 72.

Plaintiffs were constructing a home in New Bern, North Carolina. *Id.* On several occasions while construction was in progress, the building inspector inspected the residence for building code violations. *Id.* On 20 December 1990, he issued plaintiffs a thirty day temporary certificate of occupancy, permitting plaintiffs to move into their house subject to a number of "small jobs" being completed. *Id.* After moving into the house, plaintiffs discovered several major structural defects in its construction including, but not limited to, sagging and shifting floors, doors failing to close, windows out of plumb, cracked sheetrock and other wall materials, unlevel staircases, cracking brick veneer, leaking roof, and rotting front porch columns. *Id.* Plaintiffs sought to assert claims of negligence, gross negligence and negligent infliction of emotional distress against the City of New Bern and its employees. *Id.*

MOSELEY v. L & L CONSTRUCTION, INC.

[123 N.C. App. 79 (1996)]

The plaintiffs' primary claim against the defendants was premised on the theory of ordinary common law negligence. Plaintiffs alleged that defendants were negligent in various respects in the inspection of their residence during construction, including their failure to locate and require correction of numerous building code violations and structural defects and their failure to advise plaintiffs that the house was structurally unsound and unfit for occupation. *Id.* at 517-518, 459 S.E.2d at 73.

This Court stated,

[t]he public duty doctrine is a common law rule providing for the general proposition that a municipality and its agents ordinarily act for the benefit of the general public and not for a specific individual when exercising its statutory police powers, and, therefore, cannot be held liable for a failure to carry out its statutory duties to an individual.

Id. at 518, 459 S.E.2d at 73 (1995) (citing *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992); *Lynn v. Overlook Development*, 98 N.C. App. 75, 389 S.E.2d 609 (1990), *review allowed* by 327 N.C. 140, 394 S.E.2d 176 (1990), *affirmed in part, reversed in part*, 328 N.C. 689, 403 S.E.2d 469 (1991)). Two exceptions to the public duty doctrine are (1) "where there is a special relationship between the injured party and the municipality" and (2) "where the municipality . . . creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902, (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)).

A showing that a municipality has undertaken to perform its duties to enforce safety statutes like the North Carolina State Building Code is not sufficient, by itself, to show the creation of a special relationship with particular individual citizens. *Sinning* at 519, 459 S.E.2d at 74. Further, to bring themselves within the special duty exception to the public duty doctrine, plaintiffs must show that an actual promise was made to create a special duty, the promise was reasonably relied upon by plaintiffs, and that the plaintiffs' injury was causally related to such reliance. *Braswell* at 371, 410 S.E.2d at 902. "Our courts have applied the two exceptions to the public duty doctrine very narrowly in this State." *Clark v. Red Bird Cab Co.*, 114 N.C.

MOSELEY v. L & L CONSTRUCTION, INC.

[123 N.C. App. 79 (1996)]

App. 400, 404, 442 S.E.2d 75, 78, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

In *City of New Bern v. New Bern Craven Co. Bd. of Ed.*, 338 N.C. 430, 437, 450 S.E.2d 735, 740 (1994), the Supreme Court discussed the significance of the legislature enacting two sets of statutes addressing building inspections. N.C. Gen. Stat. § 160A-411 *et seq.* address the procedures for *city* building inspections and N.C. Gen. Stat. § 153A-350 *et seq.* set forth the procedures for *county* inspections. "This statute [160A-411] does not mandate that the City and the county must agree regarding the provision of inspection services; rather, it provides the options available to the City in determining who shall perform the inspections, one of which is arranging for the county to perform them." *Id.* at 437-438, 450 S.E.2d at 740. Further, N.C. Gen. Stat. § 153A-353 (1991) even allows counties to contract with other counties or with cities to maintain a joint inspection department. Thus, the positions of City building inspector and County building inspector are virtually interchangeable.

The plaintiffs in the present case do not fall within either exception to the public duty doctrine. They have not shown that a special relationship or a special duty was created between them and the defendants. As in the *Sinning* case, we find based on the present facts that Ollis, the building inspector and Burke County owed no duty to the plaintiffs individually. Instead, they owe a duty generally to the public to . . .

enforce within the county's territorial jurisdiction State and local laws and local ordinances and regulations relating to: (1) The construction of buildings; (2) The installation of such facilities as plumbing systems, electrical systems, heating systems, refrigeration systems, and air-conditioning systems; (3) The maintenance of buildings in a safe, sanitary, and healthful condition, and (4) Other matters that may be specified by the board of commissioners.

N.C. Gen. Stat. § 153A-352 (1991). Thus, the trial court's dismissal of plaintiffs' negligence action against Ollis and Burke County was proper.

Plaintiffs' second assignment of error is that the trial court erred in granting defendants' motion to dismiss plaintiffs' claim of negligent infliction of emotional distress. We disagree.

MOSELEY v. L & L CONSTRUCTION, INC.

[123 N.C. App. 79 (1996)]

Our Supreme Court's decisions in *Sorrells v. M. Y. B. Hospitality Ventures of Asheville*, 334 N.C. 669, 435 S.E.2d 320 (1993), and *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993) are dispositive as to the issue of negligent infliction of emotional distress, and the trial court properly dismissed this claim.

Plaintiffs' final assignment of error is, the allegations in their complaint, if treated as true, are sufficient to withstand defendants' 12(b)(6) motion with respect to their wilful and wanton conduct claim. We disagree.

Plaintiffs base their argument on paragraph 47 of the Complaint:

Upon information and belief, defendant Burke County has insurance coverage such that it is liable under N.C.G.S. § 153A-345 to the plaintiffs for any damages sustained by them by reason of the negligent, fraudulent, wilful and/or wanton misrepresentations and conduct of defendant Ollis and even if it should be determined that he was acting outside the scope of his duties at the times in question.

This is the only factual allegation made relating to any wilful or wanton conduct on behalf of defendant Ollis. Further, the public duty doctrine has previously barred claims of gross negligence.

"The public duty doctrine previously has barred claims of gross negligence. . . . Only where the conduct complained of rises to the level of an intentional tort does the public duty doctrine cease to apply. We have examined plaintiff's complaint and find no difference between the allegations used to support negligence, gross negligence, and the actions plaintiff describes as 'wanton,' 'wilful,' and 'reckless.' As long as the claim is negligence, even couched in terms of 'gross,' 'wanton,' or 'wilful,' the public duty doctrine supports the dismissal of the complaint based on the failure to state a claim." (Citations omitted.)

Sinning at 521, 459 S.E.2d at 75 (quoting *Clark* at 406, 442 S.E.2d at 79). In *Sinning*, plaintiffs' primary claim was negligence and they alleged that Linwood E. Toler, a building inspector, had acted in a wilful, wanton way. Likewise, in the present case plaintiffs' primary claim is one of negligence and they have not alleged different facts to support their claim of Ollis' wilful and wanton conduct. Therefore, because plaintiffs failed to allege facts to support their claim of wilful and wanton conduct, it was properly dismissed by the trial court.

STATE v. KIRKPATRICK

[123 N.C. App. 86 (1996)]

Affirmed.

Judges JOHN and MCGEE concur.

STATE OF NORTH CAROLINA v. COYE HAVEN KIRKPATRICK

No. COA94-1322

(Filed 2 July 1996)

1. Evidence and Witnesses § 785 (NCI4th)— testimony excluded—similar evidence admitted—exclusion as harmless error

Even if the trial court erred by excluding defendant's testimony regarding statements made by a fellow employee to defendant which would negate defendant's knowledge that the endorsement on a check which he tried to cash was forged, defendant failed to show that he was prejudiced by such exclusion since he was allowed to present substantially the same evidence as that excluded by the trial court, and any error was harmless.

Am Jur 2d, Appellate Review § 759.**2. Criminal Law § 1110 (NCI4th)— habitual felony adjudication as aggravating factor—no error**

Because the trial court could have considered as aggravating factors three felony convictions which supported defendant's 1987 habitual felony adjudication, there was no error in considering the habitual felony adjudication as a nonstatutory aggravating factor for defendant's present sentence as long as the underlying felonies were not also considered as aggravating factors.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 15.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 21 April 1994 in Alamance County Superior Court by Judge J.B. Allen, Jr. Heard in

STATE v. KIRKPATRICK

[123 N.C. App. 86 (1996)]

the Court of Appeals 12 September 1995. Remanded to the Court of Appeals from the North Carolina Supreme Court to address defendant-appellant's assignments of error on 10 May 1996.

Attorney General Michael F. Easley, by Assistant Attorney General J. Mark Payne, for the State.

Robert H. Hood III for defendant-appellant.

GREENE, Judge.

Coye Haven Kirkpatrick (defendant) appeals from a judgment and commitment, entered after a jury verdict, sentencing him to forty-six years in prison for uttering an instrument bearing a forged endorsement, a Class I felony, in violation of N.C. Gen. Stat. § 14-120, enhanced by the finding that defendant is an habitual felon, pursuant to N.C. Gen. Stat. § 14-7.1.

The record reveals that defendant worked at a restaurant in Burlington, N.C. during the year of 1993. In the fall of 1993, Sherri Mann (Mann) worked at the restaurant for approximately three weeks. After leaving her employment there, Mann did not receive her last pay check in the amount of \$24.05. On 7 November 1993, defendant was arrested after he attempted to have a convenience store clerk cash Mann's check, in the amount of \$24.05.

At trial defendant testified that he obtained the check from Gloria Foster (Foster), an assistant manager at the restaurant where defendant works, with whom defendant testified he had a "romantic relationship." Defendant further testified that two other managers advanced him money on one occasion each and that Foster advanced money to defendant "probably over ten times." Defendant knew that the employees' paychecks were kept in a safe at the restaurant, and that only three people, including the two managers Michael Fields and Foster, had keys to the room which contained the safe. Although defendant worked in close proximity to this room, it was locked at all times and "somebody would have seen" him if he tried to enter the room. Defendant stated also that although Foster gave him some preferential treatment, "[s]he didn't give [him] access to nobody else's check." On 7 November 1993, defendant asked for an advance and Foster gave him Mann's check, which defendant stated was endorsed when he received it from Foster. Defendant further testified that he did not forge the endorsement himself, nor did he know that the endorsement was forged. When discussing his receipt of the check

STATE v. KIRKPATRICK

[123 N.C. App. 86 (1996)]

from Foster, defendant wanted to testify regarding Foster's statement to defendant when she gave him the check. On voir dire, outside of the jury's presence, defendant testified that Foster told him to "get it cashed and they'll reimburse it" and that it was his understanding that "Sherri Mann signed the check and they paid her in cash." Defendant then testified before the jury that on occasion the restaurant had cashed defendant's checks, thus indicating that the restaurant may have cashed Mann's check.

After the jury returned its guilty verdict on the charge of uttering an instrument bearing a forged endorsement, the trial court conducted a separate proceeding on the charge of habitual felon. The jury, based upon evidence that defendant pled guilty to felony larceny in 1984, felony larceny in 1982 and breaking and entering and larceny in 1972, determined that defendant met the habitual felon requirements, pursuant to N.C. Gen. Stat. § 14-7.1, thus elevating defendant's sentence to that of a Class C felon. The record also shows that defendant was previously adjudicated as an habitual felon in 1987, after his conviction for possession of stolen property. The 1987 adjudication was based on the same three guilty pleas as the 1993 habitual felon adjudication. Not included in either determination of defendant's status as an habitual felon is defendant's guilty plea to a 1976 breaking and entering a motor vehicle and larceny from an auto, a 1977 guilty plea of breaking and entering, and his 1986 guilty plea of possession of stolen property. After the jury's determination in the 1993 habitual felon proceeding, the trial court found two aggravating factors; that defendant "has prior convictions for criminal offenses punishable by more than 60 days confinement" and that "the defendant has previously been adjudicated as an habitual offender on April 27, 1987." The prior convictions used by the trial court are the 1976, 1977 and 1986 guilty pleas which did not serve as a basis for either habitual felon adjudication. The court then found three mitigating factors; "defendant exercised caution to avoid serious bodily harm or fear to other persons" and that defendant cooperated with police when he was stopped on 7 November 1993, and that "[d]efendant was a good employee and hard worker." The trial court then determined that the aggravating factors outweigh the mitigating factors and entered a sentence for forty-six years, which is greater than the presumptive term of fifteen years for a Class C felon.

The issues are whether (I) defendant was prejudiced by the trial court's exclusion of testimony regarding Foster's statement to defendant when he received the check; and (II) the trial court erred

STATE v. KIRKPATRICK

[123 N.C. App. 86 (1996)]

in its finding that the adjudication of defendant as an habitual felon in 1987 is a factor in aggravation of his sentence.

I

[1] Defendant argues that the trial court erred by excluding his testimony regarding statements made by Foster to defendant, which would negate defendant's knowledge that the endorsement was forged. Even assuming, however, that this exclusion was erroneous, defendant has failed to show that he was prejudiced. N.C.G.S. § 15A-1443(a) (1988). In fact defendant was allowed to advance his theory that he did not possess the requisite knowledge for the crime by defendant's testimony that he did not put the endorsement on the check, that the check was endorsed when he received it from Foster and that he did not know that the endorsement was false. Furthermore, defendant was allowed the opportunity to advance his theory of how Foster could have had the endorsed check without Mann's endorsement being forged. Accordingly, defendant was allowed to present substantially the same evidence as that excluded by the trial court and any error was harmless. *See State v. Hageman*, 307 N.C. 1, 23-24, 296 S.E.2d 433, 446 (1982) (no prejudice from erroneous exclusion where same or substantially same testimony is admitted).

II

[2] The defendant argues that the trial court erred in its consideration of defendant's 1987 adjudication as an habitual felon as a non-statutory aggravating factor. We disagree.

In this case the 1987 habitual felony adjudication represents three separate felony convictions. Because the trial court could have considered, as aggravating factors, these three felony convictions, *State v. Roper*, 328 N.C. 337, 363, 402 S.E.2d 600, 615, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991), it follows that there is no error in considering the habitual felony adjudication as an aggravating factor, as long as the underlying felonies are not also considered as aggravating factors. This record does not reveal that the trial court considered, as aggravating factors, both the 1987 habitual felony adjudication and the felonies on which that adjudication was based. Therefore, the use of the 1987 habitual felony adjudication to aggravate the sentence and the use of the 1993 habitual felony adjudication to enhance the sentence was not error. *Id.*; N.C.G.S. § 14-7.6 (1993) (habitual felony adjudication enhances sentence).

STATE v. KIRKPATRICK

[123 N.C. App. 86 (1996)]

No error.

Judge SMITH concurs.

Judges WYNN dissents.

Judge WYNN dissenting.

The majority acknowledges that the same three convictions used to establish defendant's status as a habitual felon in 1987 were used to establish defendant's status as a habitual felon in the case at hand.¹ Since the supporting three convictions are the same, the 1993 habitual felon status in this case is *identical* to the 1987 habitual felon status. Thus, by using the 1987 habitual felon status to also aggravate the present sentence, the majority, in effect holds that the 1993 habitual felony status may be used to both enhance and aggravate its underlying felony. That is a patently unfair result; accordingly, I dissent.

Moreover, while in *Roper* our Supreme Court sanctioned the double use of *prior convictions* to both establish the status of habitual felon and aggravate the sentence, it did not provide for the use of the defendant's status as a habitual felon to be used for both enhancement and aggravation.

I further disagree with the State's use of the same prior convictions, some five years later, in support of a subsequent indictment to obtain the same "status" of being a habitual felon. In essence, the three underlying convictions that are used to establish the defendant's status as a habitual felon in 1987 are used again in 1993 to establish the same status. Indeed, this Court has stated that "[t]his implies that being an habitual felon is a status, that once attained is never lost." *State v. Smith*, 112 N.C. App. 512, 517, 436 S.E.2d 160, 162 (1993). Thus, once an individual is marked as a habitual felon, she is branded for life. The logical extension of this result would be to require such individuals to wear a "scarlet letter" for life, with no means of removing it.

1. In the factual section of this opinion, the majority states: "The 1987 adjudication was based on the same three guilty pleas as the 1993 habitual felon adjudication."

IN RE JURGA

[123 N.C. App. 91 (1996)]

IN THE MATTER OF: JOSEPH PETER (TREY) JURGA, III, Respondent

No. COA94-1439

(Filed 2 July 1996)

Parent and Child § 96 (NCI4th)— termination of parental rights—unilateral declaration by parents insufficient—petition for appointment of guardian—dismissal proper

Nothing in the statutorily established procedure for the termination of parental rights allows for a unilateral declaration of termination by the natural parents, and nothing in the record of this case indicated the existence of the statutorily prescribed two-stage proceeding at which the trial court, and not the parents, resolves the issues of whether grounds for termination exist and, if so, whether termination would indeed be in the best interests of the child; therefore, since the parental rights of the parents had not been terminated by their filing of a declaration of termination, they were still the natural guardians of the minor child, and a petition for adjudication of incompetence and application for appointment of guardian was properly dismissed for lack of jurisdiction.

Am Jur 2d, Parent and Child § 7.**Validity of state statute providing for termination of parental rights. 22 ALR4th 774.**

Petitioners appeal from order filed 27 September 1994 by Judge Marcus L. Johnson in Gaston County Superior Court. Heard in the Court of Appeals 4 October 1995.

Booth Harrington Johns & Campbell, L.L.P., by A. Frank Johns, for petitioners-appellants.

Henry L. Fowler, III for respondent-appellee.

JOHN, Judge.

Petitioners contend the trial court erred by dismissing petitioners' application for appointment of a guardian of the person of the minor respondent (Trey). We disagree.

Pertinent facts and procedural information are as follows: Born in 1981, Trey has been afflicted since birth with severe mental retar-

IN RE JURGA

[123 N.C. App. 91 (1996)]

dation, Beckwith-Weiderman Syndrome and chronic Ectopic Atrial Tachycardia. He remained in acute care hospital settings until 1992 when he was transferred to Holy Angels Services, Inc. (Holy Angels), a less restrictive intermediate care facility for mentally retarded patients located in Gaston County, North Carolina. Patient services at Holy Angels are provided through funding entitlements from state and federal agencies, North Carolina entitlements being available to a minor whose parent or legal guardian is domiciled in North Carolina.

Subsequent to Trey's placement at Holy Angels, however, his parents, Joseph Peter Jurga, Jr. and Melanie S. Jurga (the Jurgas), were relocated by his father's employer to a new job in South Carolina. The North Carolina entitlements were thus at risk. At the direction of the North Carolina Department of Public Instruction, the Jurgas arranged appointment of a North Carolina resident as Trey's "surrogate parent" for purposes of maintaining the child at Holy Angels with governmental benefits. However, the Jurgas were informed in 1994 that such appointment might be insufficient. The Jurgas were aware that Trey's removal from Holy Angels would severely and detrimentally impact his educational and functional progress, but considered their financial resources insufficient to continue the placement without governmental entitlements.

On 27 May 1994, the Jurgas each executed a "Declaration of Voluntary Termination of Parental Rights" (the Declaration), in which they proclaimed the following:

7. Based on the threatened loss of necessary residential services for Trey, and the potential for financial liability which we might be obligated, but unable to pay, we declare that our son is dependant and neglected as those words are defined in N.C. Gen. Stat. Sec. 7A-517(13) and (21) of the North Carolina Juvenile Code, and further that our son is educationally and residentially abandoned, and threatened with immediate potential loss of educational, habilitative and residential services necessary to ameliorate his agglomerate disabilities;

8. In order to insure that [our] son not suffer neglect, abandonment, loss of services and dependency, [we] hereby voluntarily declare termination of [our] parental rights as said termination is defined under Article 24B of N.C. Gen. Stat. Chp. 7A.

....

IN RE JURGA

[123 N.C. App. 91 (1996)]

10. Having voluntarily terminated [our] parental rights, [we] request the Clerk to receive, and [we] support the application of Robert W. Simmons and Lee H. Simmons as co-guardians of the person of [our] son, Trey.

Thereafter, on 15 June 1994, petitioners Robert W. Simmons and Lee H. Simmons, relatives of Trey's mother and residents of North Carolina, filed a "Petition for Adjudication of Incompetence and Application For Appointment of Guardian" (the Petition) before the Clerk of Gaston County Superior Court (the Clerk), attaching the Declaration. That same day, the Clerk appointed J. Ben Morrow (Morrow) as Guardian *Ad Litem* for Trey. On Trey's behalf, Morrow answered the Petition 22 June 1994, seeking dismissal of the action on several grounds, including lack of jurisdiction.

Following a telephonic hearing conducted 24 June 1994, the Clerk entered an order of dismissal 28 June 1994 and taxed petitioners with costs and guardian *ad litem* fees. Pursuant to N.C.G.S. §§ 35A-1115 and 1-272, petitioners appealed the decision to the Superior Court and both parties filed briefs supporting their respective positions.

On 26 September 1994, the trial court entered an order dismissing the application and containing the following conclusion:

5. Neither the Clerk of Superior Court, the Court of original jurisdiction, nor this Court has jurisdiction to adjudicate the incompetence of a 13 year old minor who is alleged to be incompetent in the verified Petition filed in the matter and that the Petition of Robert W. Simmons and Lee H. Simmons should be dismissed.

From this order, petitioners filed a Notice of Appeal to this Court 12 October 1994.

Petitioners contend the Petition constituted an action falling under Subchapter II [Guardian and Ward], N.C. Gen. Stat. §§ 35A-1220 through 1228. Consequently, they continue, the definitions and jurisdictional requirements set out in the subchapter control and allow appointment of a guardian of the person for Trey by the Clerk. However, assuming *arguendo* the accuracy of these assertions, we nonetheless conclude the petition was properly dismissed on the basis of lack of jurisdiction.

IN RE JURGA

[123 N.C. App. 91 (1996)]

The pertinent statutory provisions are as follows:

(12) The term “minor” means a person who is under the age of 18, is not married, and has not been legally emancipated.

....

(a) The General Assembly of North Carolina recognizes that:

....

(6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

....

(b) The purposes of this Subchapter are:

(1) To establish standards and procedures for the appointment of guardians of the person, . . . and for minors who need guardians.

....

(a) Clerks of superior court in their respective counties have original jurisdiction for the appointment of . . . general guardians for minors who have no natural guardian

N.C. Gen. Stat. §§ 35A-1202(12), 35A-1201(a)(6), 35A-1201(b)(1), and 35A-1203(a).

Under this subchapter, therefore, the Clerk may appoint a guardian only for a minor who has no parent or natural guardian. G.S. §§ 35A-1201(a)(6), 35A-1201(b)(1), and 35A-1203(a). Although Trey, 13 years old at the time of hearing, appears to meet the definitional requirements of G.S. § 35A-1202(12), we reject petitioners’ contention that he is without a natural guardian as the result of filing by the Jurgas of the Declaration.

We have previously held “[t]he *exclusive* judicial procedure to be used in termination of parental rights cases is prescribed by the Legislature in N.C. Gen. Stat. § 7A-289.22, *et seq.* [Art. 24B].” *In re*

IN RE JURGA

[123 N.C. App. 91 (1996)]

Curtis v. Curtis, 104 N.C. App. 625, 626-27, 410 S.E.2d 917, 919 (1991) (emphasis added) (trial court erred by granting summary judgment in TPR action because "Article 24 of Chapter 7A does not provide for a summary proceeding . . ."); *see also In re Pierce*, 53 N.C. App. 373, 380, 281 S.E.2d 198, 203 (1981) ("The statutorily established procedure for the termination of parental rights does not include the right to file a counterclaim, and we will not add that right by imputation.")

In G.S. § 7A-289.22, our General Assembly declared its purpose in enacting Article 24B was

to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

N.C.G.S. § 7A-289.23 provides that the

district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition.

A petition to "terminate the parental rights of either or both parents," which institutes the action, may be filed by those persons or agencies listed in G.S. § 7A-289.24(1)-(7). *See In re Manus*, 82 N.C. App. 340, 342, 346 S.E.2d 289, 291 (1986) ("[section] limits the persons or agencies who may petition for termination of parental rights.") Following the filing of a petition, G.S. §§ 7A-289.30 and 7A-289.31 prescribe a two-stage proceeding: (1) the adjudicatory stage; and (2) the dispositional stage. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). During the adjudicatory phase, *see* G.S. § 7A-289.30, the trial court must determine whether the petitioner has met its burden to prove by clear, cogent, and convincing evidence the presence of grounds for termination as set forth in G.S. § 7A-289.32. *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). At the dispositional stage, the court decides whether termination of parental rights is in the best interests of the child; if so, termination must then be ordered. G.S. § 7A-289.31; *see also In Re McMahon*, 98 N.C. App. 92, 94, 389 S.E.2d 632, 633 (1990).

IN RE JURGA

[123 N.C. App. 91 (1996)]

Contrary to petitioners' proposition herein, however, nothing in the "statutorily established procedure for the termination of parental rights," *see Pierce*, 53 N.C. App. at 380, 281 S.E.2d at 203, allows for a unilateral "declaration of termination" by the parents, and we specifically decline to "add [such] right by imputation." *See id.* Moreover, we hold the Jurgas' attempt to relinquish their parental rights and responsibilities, *see Wells v. Wells*, 227 N.C. 614, 616, 44 S.E.2d 31, 33 (1947) (parental duty of support and maintenance), contravenes the statutorily prescribed scheme for termination of parental rights.

First, while G.S. § 7A-289.24 provides that "[e]ither parent" may institute an action seeking termination of the rights of the *other*, it expressly limits the persons and agencies who may petition for termination, *Manus*, 82 N.C. App. at 342, 346 S.E.2d at 291, and in no wise includes natural parents jointly seeking termination of their *own* parental rights. Moreover, strikingly absent in the record *sub judice* is evidence of the statutorily prescribed two-stage proceeding at which the *trial court*, and *not* the *parents*, resolves the issues of whether grounds for termination exist, and if so, whether termination would indeed be in the best interests of the child. *See White*, 81 N.C. App. at 85, 344 S.E.2d at 38; and *McMahon*, 98 N.C. App. at 94, 389 S.E.2d at 633. In sum, we agree with appellee-guardian *ad litem's* assessment that "[s]ince the parental rights of the Jurga's [sic] had not been terminated, they were still the natural guardians of the minor child, [and] therefore the Petition for Adjudication of Incompetence and Application for Appointment of Guardian was properly dismissed." *See* G.S. §§ 35A-1201(a)(6), 35A-1201(b)(1), and 35A-1203(a) (giving the Clerk of Superior Court jurisdiction to appoint a guardian for a minor only when the minor has no natural guardian, *i.e.* parent.) While not insensitive to Trey's circumstance and the dilemma faced by the Jurgas, we must follow established law. *See Roberts v. Young*, 120 N.C. App. 720, 731, 464 S.E.2d 78, 86 (1995) (this Court "is bound by the plain meaning of a statute where its language is clear and unambiguous," and our holdings "must remain consistent with any previous interpretations of a statute.")

Having determined the petition was properly dismissed on jurisdictional grounds, we decline to discuss appellants' remaining arguments.

Affirmed.

Judges MARTIN, John C. and McGEE concur.

WILLIAM C. VICK CONSTRUCTION CO. v. N.C. FARM BUREAU FEDERATION

[123 N.C. App. 97 (1996)]

WILLIAM C. VICK CONSTRUCTION COMPANY, MOVANT APPELLANT/APPELLEE v. NORTH
CAROLINA FARM BUREAU FEDERATION, RESPONDENT APPELLANT/APPELLEE

No. COA95-964

(Filed 2 July 1996)

1. Arbitration and Award § 40 (NCI4th)— failure of arbitrator to disclose relationships—denial of Rule 59 motion error

The trial court erred in denying plaintiff contractor's Rule 59 motion to alter/amend judgment, or in the alternative, to open judgment where the sole arbitrator did not disclose numerous social, business, and professional relationships with partners in the law firm representing defendant owner; these relationships were not merely trivial in nature; and the relationships were likely to affect impartiality or reasonably create an appearance of partiality or bias. N.C.G.S. § 1-567.13(a)(2).

Am Jur 2d, Alternative Dispute Resolution §§ 234 et seq.

Time for impeaching arbitration award. 85 ALR2d 779.

Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 ALR3d 132.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law. 22 ALR4th 366.

2. Arbitration and Award § 40 (NCI4th)— deposition of arbitrator—no error

The trial court did not err in allowing plaintiff to depose the arbitrator where the trial court's basis for believing that misconduct had occurred was confirmed by evidence that the arbitrator had failed to disclose numerous relationships with counsel for one of the parties.

Am Jur 2d, Alternative Dispute Resolution §§ 234 et seq.

Time for impeaching arbitration award. 85 ALR2d 779.

WILLIAM C. VICK CONSTRUCTION CO. v. N.C. FARM BUREAU FEDERATION

[123 N.C. App. 97 (1996)]

Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 ALR3d 132.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law. 22 ALR4th 366.

Appeal by movant and respondent from orders entered 27 March 1995 and 19 May 1995 by Judge Jerry R. Tillett in Wake County Superior Court. Heard in the Court of Appeals 24 April 1996.

Wyrick, Robbins, Yates & Ponton, L.L.P., by J. Anthony Penry, and Ware, Snow, Fogel & Jackson & Greene, P.C., by David A. Dial, for movant appellant/appellee.

Nicholls & Crampton, P.A., by W. Sidney Aldridge and Burns, Day & Presnell, P.A., by Daniel C. Higgins, for respondent appellee/appellant.

WYNN, Judge.

Movant William C. Vick Construction Company ("Vick"), appeals the trial court's order denying its motion to alter/amend judgment, or in the alternative, to open judgment. Additionally, respondent North Carolina Farm Bureau Federation ("Farm Bureau") appeals the trial court's order allowing Vick to depose the arbitrator. We reverse and remand in part and affirm in part.

In 1993, a dispute arose during the construction of an addition to the Farm Bureau's headquarters between Vick, the general contractor, and Farm Bureau, the owner. The construction contract required the parties to submit their disputes to arbitration administered by the American Arbitration Association ("AAA").

To arbitrate the dispute, AAA appointed Attorney Mark C. Kirby who upon appointment, disclosed the following:

I know and have worked with counsel for both Parties. I also know Mr. Aldridge [a partner in the law firm representing Farm Bureau] socially. Such relationships will not affect my ability to render a fair and impartial determination in this proceeding.

Prior to the hearing, Vick objected to Mr. Kirby's appointment because of his relationship with the parties' counsel. AAA, however, overruled the objection and the hearing proceeded.

WILLIAM C. VICK CONSTRUCTION CO. v. N.C. FARM BUREAU FEDERATION

[123 N.C. App. 97 (1996)]

At the conclusion of the arbitration hearing, Mr. Kirby rendered an award in favor of Farm Bureau. After the arbitration, Vick learned that Mr. Kirby had been indicted for racketeering, mail fraud, bank fraud, and impeding the function of a United States government agency. (Mr. Kirby later pled guilty to fraudulent billing). Vick also learned of undisclosed relationships with Farm Bureau's counsel.

Vick moved to vacate the arbitration award and gave notice of its intention to depose Mr. Kirby and to conduct additional discovery. Farm Bureau moved for a protective order. Judge Narley Cashwell granted the protective order and prohibited Vick from taking the deposition of Mr. Kirby. Subsequently, Judge Jerry R. Tillett denied Vick's motion to vacate.

Thereafter, pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (1990), Vick moved to alter/amend judgment, or in the alternative, to open judgment. On 27 March 1995, the trial court rejected Vick's contention that the guilty plea of Mr. Kirby amounted to corruption in the arbitrator which would justify the court vacating the arbitration award. The trial court did, however, agree to open its judgment and allow Vick to depose Mr. Kirby.

Following the taking of this deposition, Judge Tillett reviewed the transcript and denied Vick's motion to alter/amend judgment, or in the alternative, to open judgment. Vick and Farm Bureau both appealed.

The issues on appeal are (I) whether the newly discovered evidence by Vick warranted a granting of its Rule 59 motion, and (II) whether the trial court erred in allowing Vick to depose Mr. Kirby. We find that Vick is entitled to Rule 59 relief and that the trial court properly allowed Vick to take Mr. Kirby's deposition.

I.

[1] Vick contends that the trial court erred by denying its Rule 59 motion to alter/amend judgment, or in the alternative, to open judgment. Rule 59 provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues . . ." and that "[o]n a motion for a new trial . . . the court may open the judgment . . . , take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." A new trial may be granted on all or part of the issues for any of the following causes or grounds:

WILLIAM C. VICK CONSTRUCTION CO. v. N.C. FARM BUREAU FEDERATION

[123 N.C. App. 97 (1996)]

- (1) Any irregularity by which any party was prevented from having a fair trial;
- (2) Misconduct of the jury or prevailing party;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
- ...
- (8) Error in law occurring at the trial and objected to by the party making the motion; or
- (9) Any other reason heretofore recognized as grounds for new trial.

N.C.R. Civ. P. 59.

In this case, Vick argues that because of newly discovered evidence about Mr. Kirby's indictments and ultimate guilty plea for fraudulent billing, and his undisclosed relationships with counsel for Farm Bureau, the arbitration award should be vacated under the Uniform Arbitration Act, N.C. Gen. Stat. § 1-567.13(a)(2) (1983), which provides in pertinent part:

- (a) Upon application of a party, the court shall vacate an award where:
...
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party

In *Ruffin Woody & Assoc. v. Person County*, 92 N.C. App. 129, 139, 374 S.E.2d 165, 171 (1988), *cert. denied*, 324 N.C. 337, 378 S.E.2d 799 (1989), this Court held that an arbitrator has an affirmative duty to disclose any prior dealings with a party. Furthermore, failure to disclose prior dealings could lead to a finding of "evident partiality" on the part of an arbitrator and require that an arbitration award be vacated. *Id.* at 139, 374 S.E.2d at 172; *see also* Canon II of the Code of Ethics for Arbitrators in Commercial Disputes (requiring arbitrators to disclose "[a]ny existing or past financial, business, professional,

WILLIAM C. VICK CONSTRUCTION CO. v. N.C. FARM BUREAU FEDERATION

[123 N.C. App. 97 (1996)]

family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias”).

In the case *sub judice*, the record on appeal indicates that Mr. Kirby did not disclose numerous prior dealings with partners in the firm representing Farm Bureau. In Mr. Kirby's deposition, he revealed the following relationship with Stephani Humrickhouse, a partner in the firm:

1. He had known Ms. Humrickhouse since his first year in law school;
2. Ms. Humrickhouse dated Mr. Kirby's housemate;
3. Mr. Kirby and Ms. Humrickhouse were in the same legal fraternity;
4. Mr. Kirby was friends with Ms. Humrickhouse's husband, called him by his first name, knew about his allergies and characterized him as “one of the funniest human beings on the face of the earth”;
5. Mr. Kirby and Ms. Humrickhouse went to dinner together and attended football games together;
6. Mr. Kirby and Ms. Humrickhouse exchanged gifts at the birth of their children and their children played together;
7. Mr. Kirby's wife travelled to New York and stayed with Ms. Humrickhouse at her parents' home;
8. Mr. Kirby and Ms. Humrickhouse had a mutual friend, Howard Kahn, who was an associate at Mr. Kirby's law firm;
9. Mr. Kirby admitted that Ms. Humrickhouse referred cases to his firm. The cases were referred to his associate, Howard Kahn;
10. Ms. Humrickhouse appeared on Mr. Kirby's behalf during proceedings in the criminal case brought against Mr. Kirby and she also wrote a letter on Mr. Kirby's behalf for the U.S. District Court's consideration when determining the sentence to be imposed upon Mr. Kirby.

Additionally, Mr. Kirby disclosed his prior dealings with Gregory Crampton, another partner in the firm representing Farm Bureau. Mr. Kirby revealed, among other things, that Mr. Crampton considered serving as an expert witness on Mr. Kirby's behalf in the criminal proceedings against him and met with Mr. Kirby's criminal defense attor-

WILLIAM C. VICK CONSTRUCTION CO. v. N.C. FARM BUREAU FEDERATION

[123 N.C. App. 97 (1996)]

ney a few times, and that Mr. Crampton appeared at a detention hearing to testify on behalf of Mr. Kirby during the criminal proceedings.

Based on the foregoing, we find that Mr. Kirby, the sole appointed arbitrator, did not disclose numerous social, business, and professional relationships with partners in the law firm representing Farm Bureau, except for his description of his relationship with Mr. Aldridge. Additionally, we find that these relationships were likely to affect impartiality or reasonably create an appearance of partiality or bias. We also note that the relationships involved in the case before us are not merely trivial in nature. *See Creative Homes and Millwork v. Hinkle*, 109 N.C. App. 259, 426 S.E.2d 480 (1993) (holding that an arbitration award must be vacated if an arbitrator fails to disclose any relationship which is not merely trivial in nature). Indeed, Mr. Kirby had significant business relationships and friendships with Farm Bureau's counsel.

Because of Mr. Kirby's failure to affirmatively disclose these relationships, the trial court erred in not granting Vick's Rule 59 motion. We therefore reverse and remand.

II.

[2] Farm Bureau contends that the trial court erred in allowing Vick to depose Mr. Kirby.

Where an objective basis exists for a reasonable belief that misconduct has occurred, the parties to the arbitration may depose the arbitrators relative to that misconduct and such depositions are admissible in a proceeding under N.C.G.S. § 1-567.13 to vacate an award. *Fashion Exhibitors v. Gunter*, 291 N.C. 208, 219, 230 S.E.2d 380, 388 (1976), *appeal after remand*, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Here, the trial judge in his order allowing the deposition of Mr. Kirby, found as a fact that evidence of the earlier disclosed relationships between Mr. Kirby and counsel for Farm Bureau did not "constitute evidence of a substantial undisclosed relationship." However, the court further found that, "if after the conclusion of these discovery efforts, there is [other] evidence of a substantial undisclosed relationship, . . . the Court will consider that evidence to determine if its earlier judgment should be altered and/or amended." Thereafter, the trial court's objective basis for believing that misconduct had occurred was confirmed by the discovery of numerous undisclosed relationships between Mr. Kirby and counsel for Farm Bureau. Thus,

NATIONWIDE MUTUAL INS. CO. v. WILLIAMS

[123 N.C. App. 103 (1996)]

we find that it was proper for Vick to depose the arbitrator. We therefore affirm this portion of the trial court's order.

For the foregoing reasons, the trial court's order is,

Reversed and remanded in part, affirmed in part.

Judges JOHNSON and WALKER concur.



NATIONWIDE MUTUAL INS. CO., PLAINTIFF V. LANDIS O. WILLIAMS, DEFENDANT

No. COA95-320

(Filed 2 July 1996)

Insurance § 527 (NCI4th)— UIM provision—named insured and listed driver not synonymous—defendant not driving covered vehicle—no UIM coverage

Defendant driver was not a class one insured entitled to UIM coverage under an auto policy naming defendant's father-in-law as the named insured and his wife as a "listed driver" since the term "driver" is not synonymous with "named insured," and he was thus not entitled to coverage as the spouse of a named insured. Nor did defendant qualify as a class two insured under his father-in-law's policy because one of the vehicles listed thereon was co-owned by defendant's wife where, at the time of the accident, defendant was occupying an automobile owned by his father which was neither a "covered vehicle" under the policy nor a vehicle being operated by the named insured or his resident spouse.

Am Jur 2d, Automobile Insurance §§ 246 et seq.

Appeal by defendant from order entered 27 February 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 7 December 1995.

Bailey & Dixon, by David S. Coats, for plaintiff-appellee.

Keel Law Offices, by John E. Aldridge, Jr. and Susan M. O'Malley, for defendant-appellant.

NATIONWIDE MUTUAL INS. CO. v. WILLIAMS

[123 N.C. App. 103 (1996)]

JOHN, Judge.

In this declaratory action, defendant assigns as error the trial court's denial of his motion for summary judgment and its entry of summary judgment in favor of plaintiff Nationwide Mutual Ins. Co. (Nationwide). For the reasons set forth herein, we affirm the trial court's determination that defendant is not entitled to underinsured motorists (UIM) coverage under any Nationwide insurance policy applicable to the instant cause of action.

Pertinent background and procedural information is as follows: On 7 November 1992, defendant sustained serious personal injuries as the result of a motor vehicle collision (the collision) between an automobile owned and operated by Nellie Carmichael (Carmichael) and a 1988 Ford automobile operated by defendant and owned by his father, Donell Williams.

At the time of the collision, defendant resided in the same household as his wife, Evelyn Pittman Williams (Evelyn), and her mother, Vernell Lawrence (Vernell). Defendant's father-in-law, Harvey Lawrence (Harvey), maintained a completely separate residence as he and Vernell had divorced approximately nine months earlier. It is undisputed that Carmichael's negligence was the sole proximate cause of the collision and defendant's injuries.

All insurance policies applicable to the collision were issued by Nationwide and included the following relevant provisions: (1) Carmichael's policy provided liability coverage with limits of \$50,000 per person/\$100,000 per accident; (2) Vernell's policy provided UIM coverage in the amount of \$50,000 per person/\$100,000 per accident; and (3) Harvey's policy provided UIM coverage in the amount of \$50,000 per person and \$100,000 per accident.

Upon exhaustion of the liability limits of Carmichael's policy, defendant asserted entitlement to UIM coverage under the policies of both Vernell and Harvey for a stacked amount of \$100,000, and thus sought from Nationwide \$50,000 in UIM coverage payments after setting off the liability coverage he had received under Carmichael's policy. Nationwide admitted coverage of defendant for UIM purposes under Vernell's policy, but stressed he was "not entitled to UIM coverage under [Harvey's] [p]olicy and, since the amount of UIM coverage in [Vernell's] [p]olicy equals the amount of liability coverage available," Nationwide has no UIM coverage obligation.

NATIONWIDE MUTUAL INS. CO. v. WILLIAMS

[123 N.C. App. 103 (1996)]

Following the parties' cross-motions for summary judgment, the trial court entered an order granting Nationwide's motion and denying that of defendant. The latter filed notice of appeal to this Court 1 March 1995.

The issue herein is whether defendant is afforded UIM coverage under Harvey's policy (the policy). Defendant claims coverage because Evelyn (1) was a "listed driver" under the policy and 2) was co-owner of a vehicle appearing on the policy declarations page. He asserts "Nationwide Insurance Company should not be allowed to limit its exposure by denying [defendant] coverage on the ground that his wife was not a 'named insured' " under the policy. "It would be patently unfair," defendant continues, "to allow Nationwide to capitalize on their technical distinction between a named insured and a listed driver where an extension of coverage would have been available to [Evelyn] at no additional premium." We find defendant's arguments unpersuasive.

Our Supreme Court has noted "the well-settled principle that an insurance policy is a contract, and its provisions govern the rights and duties of the parties thereto." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). We as a court must "construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used," *id.*, and only when the contract is ambiguous does strict construction become inappropriate. *Id.* at 381, 348 S.E.2d at 796.

The uninsured/UIM motorist coverage provisions of the policy at issue herein allow insureds to recover for personal injuries, defining "insured" as:

1. You or any family member;
2. Any other person occupying:
 - a. your covered auto; or
 - b. any other auto operated by you;
3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person listed in 1. or 2. above.

"You" and "your" under the policy means "[t]he 'named insured' shown in the Declarations" and "[t]he spouse if a resident of the same household."

NATIONWIDE MUTUAL INS. CO. v. WILLIAMS

[123 N.C. App. 103 (1996)]

Our Supreme Court has determined the nearly identical formulations contained in N.C. Gen. Stat. § 20-279.21(b)(3) to establish two classes of insureds for purposes of UIM coverage:

- “(1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and
- (2) any person who uses with consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.”

Smith v. Nationwide Mutual Ins. Co., 328 N.C. 139, 143, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991) (citation omitted.) We therefore consider whether defendant qualifies as a class one or class two insured under the policy.

Defendant argues that “as the spouse of a named insured,” he should be “considered [a] [c]lass one insured.” While defendant might be correct if Evelyn indeed were a named insured, our examination of the policy reveals Harvey to be the sole “named insured,” while Evelyn is listed only as a “driver” for underwriting purposes.

Enforcing the policy as written and declining to rewrite its terms, *Fidelity*, 318 N.C. at 380, 348 S.E.2d at 796, we reject defendant's contention that the term “driver” is synonymous with “named insured.” Dispositive on this issue is *Brown v. Truck Ins. Exchange*, 103 N.C. App. 59, 404 S.E.2d 172, *disc. review denied*, 329 N.C. 786, 408 S.E.2d 515 (1991), wherein this Court held that listing the plaintiff as an “additional insured” on a policy of insurance did not operate to qualify him as a “named insured” within that policy. *Id.* at 62-63, 404 S.E.2d at 174-75. As in *Brown*, we find no authority to “expand[] the term ‘named insured’ beyond its explicit common sense meaning. The term appears frequently in the statute at issue in such a way as to distinguish the ‘named insured’ from other covered persons.” *Id.* at 63, 404 S.E.2d at 175.

Similarly, in *Sproles v. Greene*, 329 N.C. 603, 609, 407 S.E.2d 497, 500 (1991), our Supreme Court held employees of a corporation were not included as “named insureds” under a policy of insurance for UIM purposes when only the corporation was listed as a “named insured” within that policy. Likewise in *Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (1991), under circumstances where a corporation was the sole “named insured” on a policy, this Court ruled plaintiff-shareholder did not qualify for “named insured” status although she “had exclusive business and personal use” of the covered vehicle and her name appeared as a “named driver and person insured for coverage”

NATIONWIDE MUTUAL INS. CO. v. WILLIAMS

[123 N.C. App. 103 (1996)]

on the declarations page of the policy. *Id.* at 593-594, 406 S.E.2d at 629-30. *Accord Sheppard v. Allstate Ins. Co.*, 21 F.3d 1010, 1014 (10th cir. 1994) (under North Carolina law, corporate president not a “named insured” because corporation was the sole “named insured” on policy declarations page.)

Defendant attempts to distinguish *Sproles* and *Busby* on grounds that the business auto policies at issue therein were between “two sophisticated parties,” while “in a personal automobile insurance policy the consumer is an unsophisticated, weaker party and [] require[s] the protection of the court.” However, as indicated above, the policy clearly and unambiguously identified Harvey as the solitary insured. “Both the insured and the insurer are presumed to know the terms, provisions, and conditions of the policy, and are bound by them.” *Chavis v. State Farm Fire and Casualty Co.*, 79 N.C. App. 213, 215, 338 S.E.2d 787, 789, *rev’d on other grounds*, 317 N.C. 683, 346 S.E.2d 496 (1986). Defendant therefore fails to meet the definition of a class one insured.

Defendant also suggests he qualifies as a class two insured for UIM purposes under the policy because one of the vehicles listed thereon is co-owned by his wife, Evelyn. This contention is unfounded.

A class two insured ordinarily is afforded UIM coverage only if occupying an “insured” or “covered” vehicle involved in a collision. *Smith*, 328 N.C. at 143, 147, 400 S.E.2d at 47, 49. Under the policy *sub judice*, a claimant may be a class two insured if injured while “occupying your [the named insured’s or their resident spouse’s] . . . covered auto[,] or . . . any other auto operated by you.” The policy defines “your covered auto” essentially as any vehicle shown in the Declarations or other vehicles which the named insured or their resident spouse might acquire.

At the time of the collision, defendant was occupying a 1988 Ford automobile owned by his father, which was neither a “covered vehicle” under the policy nor an auto being operated by Harvey or his resident spouse. Defendant therefore was not a class two insured under the policy.

Because Harvey’s policy is unambiguous, we enforce it as written, *see Fidelity*, 318 N.C. at 381, 348 S.E.2d at 796, and hold defendant has no valid claim to UIM coverage under that policy. As defendant is entitled only to the \$50,000 UIM coverage provided by Vernell’s pol-

BRITT v. JONES

[123 N.C. App. 108 (1996)]

icy, Nationwide is correct in concluding “the amount of UIM coverage in [Vernell’s] [p]olicy equals the amount of liability coverage available, [and] defendant is not entitled to any UIM coverage from [Nationwide.]” *See Ray v. Atlantic Casualty Ins. Co.*, 112 N.C. App. 259, 261-62, 435 S.E.2d 80, 81, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993) (tortfeasor’s liability coverage must be less than victim’s UIM coverage to meet threshold requirement for “underinsured motor vehicle” status under N.C. Gen. Stat. § 20-279.21(b)(4).

Based on the foregoing, the trial court’s entry of summary judgment in favor of plaintiff Nationwide is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

IRENE BRITT, PLAINTIFF/APPELLEE v. THOMAS L. JONES, SR., DEFENDANT/APPELLANT

No. COA95-1082

(Filed 2 July 1996)

1. Interest and Usury §§ 13, 20 (NCI4th)— usury paid for two years prior to action—sufficiency of evidence

The trial court correctly concluded as a matter of law that plaintiff paid defendant \$1,700 in usurious interest during the two years preceding filing of the claim, and plaintiff was entitled to have the \$1,700 doubled pursuant to N.C.G.S. § 24-2 where there was no way to determine from the scant records kept by defendant what amount of interest accrued or was paid, and the trial court properly relied on the calculations of plaintiff’s expert financial consultant whose method was consistent with the long-standing method of calculating interest to principal.

Am Jur 2d, Interest and Usury §§ 166-237, 314-338.

Usury in connection with loan calling for variable interest rate. 18 ALR4th 1068.

BRITT v. JONES

[123 N.C. App. 108 (1996)]

2. Interest and Usury § 20 (NCI4th); Unfair Competition or Trade Practices § 48 (NCI4th)— usury—unfair or deceptive practices—damages for both—no double award

The trial court properly awarded plaintiff damages for both usury and unfair or deceptive practices, and such awards did not give plaintiff a double recovery, since plaintiff's claim for unfair or deceptive practices was not based solely on defendant's usurious conduct but was instead based on defendant's alteration of the original interest rates on the promissory notes, his failure to state terms on any of the notes, his charging of different interest rates from those stated in the notes, and his refusal of plaintiff's offer to settle for a reasonable amount; furthermore, awarding damages under the usury statute alone would not have fully compensated plaintiff.

Am Jur 2d, Interest and Usury §§ 314-338.**3. Unfair Competition or Trade Practices § 51 (NCI4th)— unfair or deceptive practices—plaintiff represented by publicly funded agency—award of full attorney's fees proper**

The trial court did not err in awarding plaintiff the entire amount of her requested attorney's fees pursuant to N.C.G.S. § 75-16.1 for unfair or deceptive practices where the court made adequate findings to support its conclusions that defendant willfully charged usurious rates of interest and made an unwarranted refusal to settle; furthermore, the fact that plaintiff's counsel was a salaried employee of Legal Services of the Coastal Plains during a portion of the pendency of this action did not require an award of less than all her attorney's fees, since they should all be borne by defendant, regardless of their ultimate distribution.

Am Jur 2d, Consumer and Borrower Protection §§ 302 et seq.; Monopolies, Restraints of Trade and Unfair Trade Practices § 735.**Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 ALR4th 12.**

Appeal by defendant from judgment entered out of court and out of session 9 January 1995 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 22 May 1996.

BRITT v. JONES

[123 N.C. App. 108 (1996)]

*Katherine S. Parker-Lowe for plaintiff-appellee.**Allen W. Powell for defendant-appellant.*

WALKER, Judge.

In March 1993, plaintiff sued defendant alleging usury and unfair trade practices in connection with loans made by defendant to plaintiff in 1980 and 1981. Defendant denied all material allegations of plaintiff's complaint. Following initial discovery, plaintiff moved for partial summary judgment and a hearing was held. The court found that plaintiff was entitled to judgment as a matter of law on the issue of defendant's liability for willfully charging usurious interest on one of the loans and for unfair trade practices. The court reserved the issue of damages for trial.

Plaintiff then moved for summary judgment on the issue of damages, which motion the court denied. Following a bench trial on that issue, the court awarded plaintiff \$1,700 in damages for usury, doubled to \$3,400 pursuant to N.C. Gen. Stat. § 24-2; \$2,900 in damages for unfair trade practices, trebled to \$8,700 pursuant to N.C. Gen. Stat. § 75-16; and attorney's fees of \$4,100. Specifically, the court found that the interest rates stated in the promissory notes accompanying the loans, which ranged from fifteen to twenty percent, were not the actual rates charged by defendant. The court determined that plaintiff was actually paying rates of interest ranging from forty-three to sixty-one percent on the loans. The court found that each of the payments made by plaintiff extinguished only a portion of the interest which had accumulated from the date of the prior payment. The court concluded that during the two years preceding the filing of the lawsuit, plaintiff had paid defendant \$1,700 in usurious interest.

[1] In his first assignment of error, defendant claims that the trial court incorrectly determined the amount of damages due to plaintiff under the usury statute "in that the trial court found that there were four promissory notes executed by plaintiff in favor of defendant but allocated all payments made by the plaintiff towards only the payment of three of the promissory notes." Defendant contends that had the court correctly distributed plaintiff's payments among all four of the promissory notes, it would have found that not all of the \$1,700 paid by plaintiff to defendant in the two years preceding the lawsuit was usurious interest.

BRITT v. JONES

[123 N.C. App. 108 (1996)]

During the proceedings, plaintiff acknowledged executing three promissory notes in defendant's favor but disclaimed knowledge of a fourth note. The trial court found as a fact that there were four promissory notes executed by plaintiff in favor of defendant, and plaintiff does not appeal from that finding. Defendant's argument is nonetheless unavailing.

As both parties concede, defendant kept no record of how he allocated the payments made by plaintiff among the four loans nor is there any documentation of how defendant distributed the payments as between interest and principal. Put simply, there is no way to determine from the scant records kept by defendant what amount of interest accrued or was paid on the August 1981 note which the court found was usurious. This being the case, the trial court properly relied on the calculations of plaintiff's expert financial consultant to resolve this issue.

In accordance with the testimony of plaintiff's expert, the court found

[t]hat interest is calculated upon the principal, from the time it commences to the day of the first payment; if the payment is equal and no more than equal to the interest then due, it must extinguish the interest; if it exceeds the interest, the balance, after extinguishing the interest, must be deducted from the principal; if the payment is less than the interest, then the balance of interest must remain until the next payment. Interest must then be calculated upon the principal remaining, to the time of the next payment, which next payment must be applied in the first place to the whole of the interest then due and so on.

The record shows that the method used by plaintiff's expert was consistent with the long-standing method of calculating interest to principal. See *Bunn v. Moore*, 2 N.C. 279, 279-80 (1796). Plaintiff's expert applied payments to the four loans in chronological order, which the court found to be proper. Defendant submitted no evidence to support the assertion that the payments on the notes should have been applied differently.

Because none of the promissory notes stated a term, plaintiff's expert estimated the terms beginning at five years and increasing until he arrived at the payment amounts stated in the notes. The results of his calculations indicated that the notes would never pay out. Defendant attempted to rebut this evidence by introducing his

BRITT v. JONES

[123 N.C. App. 108 (1996)]

own amortization schedules which showed that three of the loans would have paid out in 1987 "had plaintiff been consistent in her payments." However, because defendant performed his calculations using interest rates of between eight and ten percent, instead of the much higher actual rates, the trial court properly rejected defendant's figures.

Based on all of the evidence presented, the court found that "each of the payments made by plaintiff extinguished only a portion of the interest which had accumulated from the date of the prior payment." This finding was supported by competent evidence and is binding upon this Court. *Vance Construction Co. v. Duane White Land Corp.*, 120 N.C. App. 401, 405, 462 S.E.2d 814, 816 (1995) (where trial court sitting without a jury makes findings, standard for appellate review is whether findings are supported by any competent evidence).

N.C. Gen. Stat. § 1-53 (1983) limits a plaintiff's recovery for usury to the amount of usurious interest paid during the two years preceding the filing of the claim. The court found that in the two years preceding this action, plaintiff paid defendant \$1,700. This fact was not disputed by defendant. We hold the court correctly concluded as a matter of law that plaintiff paid defendant \$1,700 in usurious interest, and plaintiff was entitled to have the \$1,700 doubled pursuant to N.C. Gen. Stat. § 24-2 (1991).

[2] In his second assignment of error, defendant asserts that the trial court erred by awarding plaintiff damages for both usurious interest and unfair trade practices, thus giving plaintiff a "double recovery." In support of this claim, defendant cites *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and affirmed*, 302 N.C. 539, 276 S.E.2d 397 (1981), in which this Court held that where the same course of conduct gives rise to a traditionally recognized action such as breach of contract as well as a cause of action for unfair trade practices, damages may be recovered for either breach of contract or unfair trade practices, but not both.

While defendant has correctly cited the rule in *Marshall*, that rule is not controlling here, since plaintiff's claim for unfair trade practices was not based solely on defendant's usurious conduct. As grounds for upholding plaintiff's unfair trade practices claim, the trial court found that in addition to willfully charging usurious interest, defendant altered the original interest rates on the promissory notes; that he failed to state terms on any of the notes; that the interest rates disclosed on the notes were not the actual rates charged; and that

BRITT v. JONES

[123 N.C. App. 108 (1996)]

defendant willfully refused plaintiff's offer to settle for a reasonable amount.

The instant case is instead controlled by *Washburn v. Vandiver*, 93 N.C. App. 657, 664, 379 S.E.2d 65, 69 (1989), where this Court held that recovery under both the North Carolina odometer disclosure statute and the unfair trade practices statute did not amount to a double recovery. The *Washburn* court stated that an action for unfair trade practices "is a distinct action apart from fraud, breach of contract, or breach of warranty" and that the remedy of unfair trade practices was created "partly because those remedies often were ineffective." *Id.* at 664, 379 S.E.2d at 69 (citation omitted). In the case at bar, it is apparent that awarding damages under the usury statute alone would not have fully compensated plaintiff. This is especially true because, although defendant's conduct giving rise to the lawsuit stretched over some ten years, recovery under the usury statute is limited to the two-year period immediately preceding the filing of the suit. N.C. Gen. Stat. § 1-53 (1983). We hold that under *Washburn*, the trial court properly awarded plaintiff damages for both usury and unfair trade practices.

The unfair trade practices statute limits the recovery of damages to four years preceding institution of suit and permits trebling of those damages. N.C. Gen. Stat. § 75-16.2 (1994); N.C. Gen. Stat. § 75-16 (1994). The trial court found that plaintiff had sustained actual damages of \$2,900 based on defendant's unfair trade practices, which finding was supported by competent evidence. The court properly concluded that plaintiff was entitled to treble that amount, or \$8,700. Plaintiff has not received a double recovery.

[3] In his third assignment, defendant argues that the court erred in awarding plaintiff attorney's fees under N.C. Gen. Stat. § 75-16.1. That statute entitles a prevailing party to attorney's fees upon specific findings that the defendant willfully engaged in the unfair or deceptive practice, that there was an unwarranted refusal to settle, and that the amount of the attorney's fees was reasonable. N.C. Gen. Stat. § 75-16.1 (1994); *Barbee v. Atlantic Marine Sales & Service*, 115 N.C. App. 641, 648, 446 S.E.2d 117, 121, *review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994). Here, the court made adequate findings to support its conclusions that defendant willfully charged usurious rates of interest and that defendant's pre-trial rejection of plaintiff's offer to settle for \$3,400 and reasonable attorney's fees constituted an unwarranted refusal to settle.

STATE v. ARTIS

[123 N.C. App. 114 (1996)]

Defendant claims that even if attorney's fees are appropriate in this case, the court erred in awarding plaintiff all of her attorney's fees because plaintiff's counsel was a salaried employee of Legal Services of the Coastal Plains during a portion of the pendency of this action. This Court has previously approved the award of attorney's fees where one or both parties were represented by publicly funded agencies. *Williams v. N.C. Dept. of Correction*, 120 N.C. App. 356, 360, 462 S.E.2d 545, 547 (1995); *Tay v. Flaherty*, 100 N.C. App. 51, 57, 394 S.E.2d 217, 220, *review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). Moreover, in the case at bar, counsel for plaintiff represented to the court that she negotiated a contract with Legal Services of the Coastal Plains for the continued representation of plaintiff upon her departure to private practice. As part of counsel's compensation for agreeing to continue to handle plaintiff's case, Legal Services of the Coastal Plains assigned to plaintiff's counsel its interest in any attorney's fees recovered. Defendant did not challenge this representation. Finally, we note that the statutory policy underlying the award of attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 is to facilitate private enforcement of Chapter 75. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985). This policy justifies shifting plaintiff's attorney's fees to defendant regardless of how they may ultimately be distributed. We conclude the trial court did not err in awarding plaintiff the entire amount of her requested attorney's fees.

Affirmed.

Judges GREENE and MARTIN, JOHN C. concur.

STATE OF NORTH CAROLINA v. VINCENT ARTIS

No. COA95-1323

(Filed 2 July 1996)

Searches and Seizures § 81 (NCI4th)— defendant in airport game room—warrantless search based on general suspicion—violation of Fourth Amendment—evidence not suppressed—error

The trial court erred in denying defendant's motion to suppress crack cocaine seized from his pocket at an airport during an

STATE v. ARTIS

[123 N.C. App. 114 (1996)]

investigatory stop and frisk where the officer had only a generalized suspicion of criminal activity, based upon defendant's presence in the airport game room which was a known area of drug activity, a bulge in defendant's pants pocket which the officer thought was either brass knuckles or the handle of a gun, and the fact that defendant had not yet passed through the airport's metal detectors, since there was no apparent need for quick action by the officer to insure that defendant was not armed with a weapon which would be used against him or others nearby.

Am Jur 2d, Searches and Seizures §§ 51, 78.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

Appeal by defendant from judgment entered 25 May 1995 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 3 June 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert G. Webb, for the State.

Public Defender Wallace C. Harrelson, by Assistant Public Defender Frederick G. Lind, for defendant.

JOHNSON, Judge.

On 3 April 1995, a Guilford County grand jury indicted defendant Vincent Artis on one count of trafficking in a controlled substance (cocaine). Defendant later filed a pretrial motion to suppress physical evidence seized from his person. Following a *voir dire* hearing on 24 May 1995, the trial court denied defendant's motion. A jury subsequently found defendant guilty as charged, and the trial court sentenced defendant to a minimum of thirty-five (35) months imprisonment and a maximum of forty-two (42) months imprisonment. The trial court also imposed a \$50,000.00 fine.

The following evidence was presented at trial: Detective J. E. Hoover of the Greensboro Police Department's Vice and Narcotics Unit testified that he was a part of a drug interdiction task force at the Piedmont Triad International Airport on 23 January 1995. On that

STATE v. ARTIS

[123 N.C. App. 114 (1996)]

date, he observed defendant operating a basketball machine in the airport game room, a location which had a reputation for drug activity. Detective Hoover also testified that the game room was in a location before it was necessary for the public and passengers to pass through the airport's metal detectors positioned near the departure gates.

Detective Hoover was dressed in casual clothes when he approached defendant in the game room. He introduced himself as a police officer and displayed his badge and picture identification card to defendant. After defendant agreed to talk with him, Detective Hoover questioned him and learned that defendant intended to take a departing flight. At this point in Detective Hoover's testimony, defense counsel asked to approach the bench.

After a bench conference, the trial court sent the jury out of the courtroom. The State then began its *voir dire* examination of Detective Hoover. The detective described seeing a large crescent-shaped bulge in defendant's left front pocket on the date in question, which appeared to be either brass knuckles or a weapon's handgrip. Although Detective Hoover asked defendant several times if defendant was carrying any weapons or drugs, defendant responded each time by asking, "Why would I carry weapons or drugs?"

Detective Hoover then told defendant that he thought defendant was carrying a weapon in his left front pocket. He informed defendant that he wanted to pat the area down to satisfy himself that the object was not a weapon. As he made this statement, Detective Hoover reached for this area of defendant's person. Defendant, however, turned away from Detective Hoover and attempted to take a step backwards. The detective, placed his hand on the object as defendant stepped back, and captured it with his hand inside defendant's pants pocket as defendant continued stepping back. Because the object was hard and fit the curvature of his hand, Detective Hoover thought that it was brass knuckles.

Defendant attempted to reach into the pocket at that time, despite a request by Detective Hoover that he not do so. Detective Hoover then reached into defendant's pocket to get control of the suspected weapon. When the detective removed the object, it was a clear plastic bag which appeared to contain crack cocaine. He subsequently placed defendant under arrest.

STATE v. ARTIS

[123 N.C. App. 114 (1996)]

The trial court then ordered that defendant's suppression motion be denied and that the seized evidence be admitted. Defendant appeals.

Defendant contends that the trial court erred in denying his motion to suppress. He argues that his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the North Carolina Constitution were violated by the search and seizure. Defendant asserts that Detective Hoover "obviously did not see any bulge" because his shirt covered the top of the pocket in question, and that the detective's reason for searching him was a pretext. For the following reasons, we reverse the trial court's order which denied defendant's motion to suppress and remand for a new trial.

The Fourth Amendment to the United States Constitution, like Article I, Section 20 of our Constitution, permits reasonable searches and seizures based upon probable cause. *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992). Notably, the Fourth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Watkins*, 337 N.C. 437, 446 S.E.2d 67 (1994) (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961)). In *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), the Supreme Court created a narrow exception to the probable cause requirement which allows a police officer to "frisk" a person in order to find weapons which the officer reasonably believes or suspects are in the possession of the person stopped. *Id.* The rationale for this exception is the need for quick action by a police officer "to insure that the person stopped is not armed with a weapon that would be used against the police or others in close proximity." *State v. Harris*, 95 N.C. App. 691, 696, 384 S.E.2d 50, 53 (1989). However, the "brief investigative stop of an individual must be based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a reasonable cautious police officer on the scene, guided by his experience and training." *State v. Allen*, 90 N.C. App. 15, 25, 367 S.E.2d 684, 689 (1988).

In its order denying defendant's suppression motion, the trial court made the following findings of fact:

4. In his experience Detective Hoover was aware of the reputation of the airport game room for drug activity and had personal

STATE v. ARTIS

[123 N.C. App. 114 (1996)]

knowledge of several narcotics arrests having been made in and around the game room.

5. Hoover approached the Defendant in the game room and asked him questions about his destination and what he was doing after identifying himself as a police officer.

6. The Defendant responded that he was on his way out of the airport and was waiting for a friend to bring him his airline ticket.

7. The officer knew at that time that if the Defendant was on his way out that he had not gone past the metal detectors at the airport security checkpoints.

8. As Detective Hoover talked with the Defendant, he observed his clothing and also observed a bulge in [Defendant's] left front pants pocket which appeared to the officer in his experience to be a weapon. The shape of the bulge led Hoover to think the object was either brass knuckles or the handle of a gun.

9. After some conversation about the bulge, Detective Hoover attempted to pat down that area on the Defendant and the Defendant moved back to avoid same.

10. Hoover then grabbed the object and it had a crescent shape and was hard to the touch which caused him to think that it was brass knuckles.

11. After Hoover grabbed the object the Defendant attempted to get it himself at which point Hoover reached in the Defendant's pocket and retrieved the object.

12. The object was a clear plastic bag containing off-white hard material which appeared to the detective in his experience to be crack cocaine and was later determined by a lab analysis to be crack cocaine.

13. The Defendant was then arrested and a further search incident to said arrest yielded an airline ticket and other items of personal property from the person of the Defendant.

From these and other findings of fact, the trial court concluded that:

STATE v. ARTIS

[123 N.C. App. 114 (1996)]

1. The officer had a right to grab what he believed to be a weapon in order to conduct a pat down search for safety purposes.
2. When the Defendant attempted to grab the object, the officer had a right to grab the object first to complete his limited search for safety reasons.
3. Any other items of property seized from the Defendant subsequent to that were seized incident to a lawful arrest.

While competent evidence in the record supports the findings of fact made by the trial court, we conclude that the facts relied upon by Officer Hoover and the rational inferences which he was entitled to draw from said facts were inadequate to support the trial court's conclusions of law. Officer Hoover had only a generalized suspicion, based upon defendant's presence in the airport game room—a bulge in defendant's pants pocket—and the fact that defendant had not yet passed through the airport's metal detectors. To infer from the bulge in defendant's pocket that he possessed a weapon because defendant would not have passed through the airport metal detectors was not reasonable.

Nor was there any apparent need for quick action by Officer Hoover to insure that defendant was not armed with a weapon that would be used against him or others nearby. When Detective Hoover approached defendant, defendant was merely operating a video game machine. A reasonably prudent officer in those circumstances would not have been warranted in the belief that his or her safety or that of others was in danger. Officer Hoover's subsequent actions did not comport with the exception created by *Terry*, and therefore, defendant's seizure was not legally justified.

Having determined that defendant's initial seizure was a violation of his Fourth Amendment right against unreasonable searches and seizures, the evidence seized as a result must be suppressed. *See* N.C. Gen. Stat. § 15A-974 (1988). Accordingly, the trial court's order denying defendant's motion to suppress the cocaine seized from his person is reversed, and the matter is remanded for a new trial.

New trial.

Judges WYNN and SMITH concur.

SOUTHERLAND v. B. V. HEDRICK GRAVEL & SAND CO.

[123 N.C. App. 120 (1996)]

ROGER FRED SOUTHERLAND, EMPLOYEE, PLAINTIFF v. B. V. HEDRICK GRAVEL & SAND COMPANY, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, DEFENDANTS

No. COA95-581

(Filed 2 July 1996)

Workers' Compensation § 46 (NCI4th)— contractor's failure to obtain subcontractor's insurance certificate—injury to subcontractor—no employee election by subcontractor—contractor not liable for compensation

A general contractor's failure to obtain a certificate of workers' compensation insurance from plaintiff subcontractor, a sole proprietor, did not render the contractor liable under N.C.G.S. § 97-19 for compensation for an injury suffered by plaintiff subcontractor since that statute protects only employees of the subcontractor and not the subcontractor himself, and plaintiff subcontractor had failed to elect to be included as an employee under the workers' compensation coverage of his business pursuant to N.C.G.S. § 97-2(2).

Am Jur 2d, Workers' Compensation § 229.

Appeal by defendants from opinion and award entered 8 February 1995 by the Full Commission. Heard in the Court of Appeals 26 February 1996.

Plaintiff, Fred Southerland, d/b/a Southerland Construction Company was injured on 12 December 1990 when he fell approximately 33 feet from a masonry wall to a concrete floor below, while at a construction project in Asheville, North Carolina. He sustained injuries to his left foot, left leg, pelvis, teeth, left ear, left wrist, left arm, and left shoulder, and was out of work from 12 December 1990 through 18 March 1991. At the time of his injury, Fred Southerland was an independent subcontractor of Buncombe Construction Company, Inc., and was engaged in the performance of work arising from the subcontract. Buncombe Construction Company, Inc., a subsidiary of defendant B. V. Hedrick Gravel and Sand Company, was the general contractor on the project. Plaintiff subcontracted with Buncombe Construction Company Inc. to perform the complete installation of a standing seam roof system with miscellaneous trims and accessories, including all equipment and labor on the project. Prior to the time of subcontracting the performance of the roofing

SOUTHERLAND v. B. V. HEDRICK GRAVEL & SAND CO.

[123 N.C. App. 120 (1996)]

work, plaintiff advised Buncombe that he maintained workers' compensation insurance coverage, but he did not provide Buncombe with a certificate of insurance, nor did they obtain a certificate from any other source. Plaintiff sublet work on the project to Service Construction Company, and requested and obtained a certificate of workers' compensation insurance from his subcontractor. Deputy Commissioner Tamara R. Nance concluded that because defendants failed to obtain a certificate of insurance from plaintiff that defendants were liable for all compensation and benefits due to plaintiff under the Workers' Compensation Act. Defendants appealed to the Full Commission and the Full Commission affirmed the holding of the Deputy Commissioner. Defendants appeal.

Scott E. Jarvis & Associates, by Scott E. Jarvis, for plaintiff appellee.

Russell & King, P.A., by Gene Thomas Leicht, for defendant appellants.

ARNOLD, Chief Judge.

Appellants first assign error to the Industrial Commission's award of workers' compensation benefits to plaintiff as a misapplication of the law. We agree and vacate the opinion and award.

The central issue in this case is whether the Industrial Commission had jurisdiction over this claim. A jurisdictional question may be raised at any stage of the proceeding. *Askew v. Tire Co.*, 264 N.C. 168, 171, 141 S.E.2d 280, 282 (1965). Ordinarily, to come within the provisions of the Workers' Compensation Act, a claimant has the burden of proving that an employer-employee relationship existed at the time of the injury. *Durham v. McLamb*, 59 N.C. App. 165, 168, 296 S.E.2d 3, 5 (1982). Further, in order for a sole proprietor to be included as an employee under his business' workers' compensation coverage, he must show that (1) he is actively engaged in the operation of the business, and that (2) his insurer is notified of his election to be covered. N.C. Gen. Stat. § 97-2(2) (1991).

Under N.C. Gen. Stat. § 97-86 (Supp. 1995) and our case law, it is axiomatic that an opinion and award entered by the Industrial Commission will not be disturbed on appeal unless a patent error of law exists therein. *Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 505, 293 S.E.2d 807, 809 (1982). The Commission's findings of fact are conclusive on appeal if they are supported by competent evidence

SOUTHERLAND v. B. V. HEDRICK GRAVEL & SAND CO.

[123 N.C. App. 120 (1996)]

even though there is evidence to the contrary. *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). However, the reviewing court has the right and the duty to make its own independent findings of jurisdictional facts from its consideration of all the evidence in the record. *Richards v. Nationwide Homes*, 263 N.C. 295, 303-304, 139 S.E.2d 645, 651 (1965). The sole proprietor's employee status is a jurisdictional fact, thus this Court has the duty to make its own independent finding, after reviewing all the evidence in the record. *Doud v. K & G Janitorial Servs.*, 69 N.C. App. 205, 208, 316 S.E.2d 664, 667, *cert. denied*, 312 N.C. 492, 322 S.E.2d 554 (1984).

The dispositive statutes in the present case are G.S. § 97-2(2) and N.C. Gen. Stat. § 97-19 (1989) (amended 1994). G.S. § 97-2(2) requires sole proprietors to make an election in order to be eligible for workers' compensation benefits.

Any sole proprietor or partner of a business whose employees are eligible for benefits under this Article may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included.

G.S. § 97-19 explains the liability of principal contractors who sublet work to subcontractors:

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than four employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any such subcontractor, any principal or partner of such subcontractor or any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any such subcontractor,

SOUTHERLAND v. B. V. HEDRICK GRAVEL & SAND CO.

[123 N.C. App. 120 (1996)]

any principal or partner of such subcontractor, or any employee of such subcontractor for compensation or other benefits under this Article. If the subcontractor has no employees and waives in writing his right to coverage under this section, the principal contractor, intermediate contractor, or subcontractor subletting the contract shall not thereafter be held liable for compensation or other benefits under this Article to said subcontractor. Subcontractors who have no employees are not required to comply with G.S. 97-93. The Industrial Commission, upon demand shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five cents (25).

The manifest purpose of this statute . . . is to protect the employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers.

Greene v. Spivey, 236 N.C. 435, 443, 73 S.E.2d 488, 494 (1952). G.S. § 97-19 protects the employees of a subcontractor, not the subcontractor himself. *Doud* at 212, 316 S.E.2d at 669.

The Full Commission adopted the opinion and award of the Deputy Commissioner, we therefore refer to the findings and conclusions of the Commission. The parties stipulated that Southerland Construction Company is located in Baileyton, Alabama and is a sole proprietorship. Also stipulated was that at the time of subletting the work on the construction project to Service Construction Company, and at the time of plaintiff's fall, Southerland Construction Company maintained a policy of workers' compensation insurance in compliance with the workers' compensation laws of Alabama and North Carolina. The Commission concluded as a matter of law:

Even though a certificate of insurance would not have shown that plaintiff failed to elect to cover himself as a sole proprietor, and even though plaintiff had complied with N.C.G.S. § 97-93. [B]y having coverage for his employees, the undersigned is of the opinion that with N.C.G.S. § 97-19 must be strictly construed, and that by failing to require and obtain a certificate of insurance from plaintiff, defendants are liable for all compensation and benefits due under the Act for plaintiff's injury by accident.

CREED v. R. G. SWAIM AND SON, INC.

[123 N.C. App. 124 (1996)]

The Commission erroneously concluded that because defendants failed to comply with G.S. § 97-19 by not obtaining an insurance certificate from plaintiff, that defendants are therefore liable. G.S. § 97-19, however, is not applicable to the present case and does not afford plaintiff coverage. Had one of plaintiff's *employees* been injured, *only then* would defendants' failure to obtain from plaintiff an insurance certificate merit the Commission awarding benefits to one of plaintiff's employees.

The facts before us show that plaintiff, a sole proprietor, failed to elect to be included as an employee under the workers' compensation coverage of his business. Consequently, plaintiff has not established that an employer-employee relationship existed at the time of injury either by electing coverage under G.S. § 97-2(2), or by being an employee under G.S. § 97-19. Therefore, because no employer-employee relationship existed the Commission lacked jurisdiction to hear plaintiff's claim and we vacate the Commission's opinion and award.

Vacated and reversed.

Judges WYNN and MARTIN, Mark D., concur.

GLADYS P. CREED, ADMINISTRATRIX OF THE ESTATE OF JIMMY GRAY CREED, DECEASED,
EMPLOYEE-PLAINTIFF V. R.G. SWAIM AND SON, INC., EMPLOYER, NATIONWIDE
MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT

No. COA95-645

(Filed 2 July 1996)

**Insurance § 530 (NCI4th); Workers' Compensation § 86
(NCI4th)— UIM coverage—employer's lien for workers'
compensation paid to employee**

An employer who has paid workers' compensation benefits to its employee is entitled to a lien on the employee's UIM benefits received by the employee in an action by the employee against the tortfeasor, and it is unimportant whether the policy in question is purchased by the employee or by his spouse residing in the same household; furthermore, N.C.G.S. § 97-10.2, which provides

CREED v. R. G. SWAIM AND SON, INC.

[123 N.C. App. 124 (1996)]

for an employer's lien against amounts its employee obtains from a third party, refers to payment from the tortfeasor and the UIM carrier.

Am Jur 2d, Insurance §§ 1793-1799; Workers' Compensation § 456.

Right of workers' compensation insurer or employer paying to a compensation fund, on the compensable death of employee with no dependents, to indemnity or subrogation from proceeds of wrongful death action brought against third-party tortfeasor. 7 ALR5th 969.

Appeal by plaintiff from Opinion and Award entered 19 January 1995 by the Full Industrial Commission. Heard in the Court of Appeals 28 February 1996.

This case arises from an accident that occurred on 13 November 1990, in which plaintiff decedent, Jimmy G. Creed, was fatally injured while in the course and scope of employment with defendant R. G. Swaim and Son, Inc. The accident was caused by the negligence of a third party, Carol Mimms, when she lost control of her vehicle and struck Mr. Creed, who was working on the highway installing pipes for his employer.

Defendant Nationwide Mutual Insurance Company (Nationwide), the workers' compensation carrier for defendant employer, admitted liability for the accident and entered into a Form 21 agreement. Pursuant to this agreement, Nationwide paid decedent's wife and administratrix of his estate, plaintiff Gladys P. Creed, \$165.12 in temporary total disability benefits for the three-day period of decedent's disability before his death.

Plaintiff and defendants then entered into a Form 30 agreement for compensation and death benefits, which was approved by order of the Industrial Commission on 21 February 1991. Pursuant to the agreement and order, Nationwide owes plaintiff 400 weekly payments of \$385.29 in death benefits, totalling \$154,116.00. In addition, Nationwide paid \$38,064.05 in medical charges for the treatment of decedent before his death and \$2,000.00 in funeral benefits.

The vehicle involved in the accident was insured under a policy issued to Ms. Mimms's husband, Edward Lee Mimms, by North Carolina Farm Bureau Mutual Insurance Company, with a per-person limit of liability of \$50,000.00. Decedent's wife had purchased a per-

CREED v. R. G. SWAIM AND SON, INC.

[123 N.C. App. 124 (1996)]

sonal automobile policy from First of Georgia Insurance Company, which provided underinsured motorist coverage of \$100,000.00 per person, applicable to the damages recoverable by decedent's estate. Farm Bureau tendered the limits of its liability coverage in the amount of \$50,000.00, and First of Georgia has \$50,000.00 available in underinsured motorist coverage—representing the limits of its underinsured motorist coverage of \$100,000.00 minus the \$50,000.00 in liability coverage paid by Farm Bureau. The parties agree that pursuant to N.C. Gen. Stat. § 97-10.2(f) (1991), Nationwide has a workers' compensation lien against the \$50,000.00 in liability insurance benefits payable by Farm Bureau. There are no other insurance policies providing coverage for the accident.

On 9 January 1992 the Industrial Commission entered an Order of Distribution denying subrogation rights to Nationwide with respect to plaintiff's underinsured motorist benefits payable by First of Georgia. On this basis, defendants moved to rescind the Order of Distribution, and the Commission subsequently vacated and set aside the order. In lieu of a hearing, the parties entered into a stipulation of facts. Deputy Commissioner Edward Garner, Jr., reinstated the Order of Distribution on 11 January 1994, but on 19 January 1995 the Full Commission reversed and granted Nationwide subrogation rights with regard to plaintiff's underinsured motorist coverage. Plaintiff now appeals.

Gardner, Gardner, & Johnson, by Carroll F. Gardner and John C. W. Gardner, Jr., for plaintiff appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens and Donald F. Lively, for defendant appellees.

ARNOLD, Chief Judge.

The sole issue on appeal is whether Nationwide, as the workers' compensation carrier, is entitled to be subrogated to plaintiff's underinsured motorist benefits. Plaintiff argues that the Commission erred in concluding that Nationwide has a lien on the proceeds of plaintiff's underinsured motorist policy. We disagree.

The rights and interests of the employee-beneficiary, the employer, and the employer's insurance carrier, with respect to a tort action against a third party, are governed by N.C. Gen. Stat. § 97-10.2 (1991). This statute provides, in pertinent part:

CREED v. R. G. SWAIM AND SON, INC.

[123 N.C. App. 124 (1996)]

(f)(1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

The Commission relied on *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990), to conclude that “[a] recovery from the employee’s uninsured/underinsured carrier is included in the statutory reference to ‘any amount obtained by . . . settlement with . . . the third party’ in N.C.G.S. § 97-10.2(f)(1).” In *Ohio Casualty*, this Court considered whether an employer’s workers’ compensation insurance carrier had a lien on the benefits of an underinsured motorist policy purchased by the plaintiff employee. We held that

N.C. Gen. Stat. § 97-10.2 provides for the subrogation of the workers’ compensation insurance carrier . . . to the employer’s right, upon reimbursement of the employee, to any payment, including uninsured/underinsured motorist insurance proceeds, made to the employee by or on behalf of a third party as a result of the employee’s injury.

CREED v. R. G. SWAIM AND SON, INC.

[123 N.C. App. 124 (1996)]

Ohio Casualty, 99 N.C. App. at 134, 392 S.E.2d at 649. In *Bailey v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 47, 54, 434 S.E.2d 625, 630 (1993), another case involving an employee's underinsured motorist policy, we stated:

Just as our Court held that the workers' compensation carrier had a lien against the UM/UIM coverage purchased by the plaintiff in *Ohio Casualty Group v. Owens*, we find that defendant [workers' compensation carrier] has a subrogation lien on the UM policy proceeds on the case herein.

See also *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 435 S.E.2d 826 (1993). In other words, "an employer who has paid workers' compensation benefits to its employee is entitled to a lien on the employee's underinsured motorist benefits received by the employee in an action by the employee against the tortfeasor." *Buckner v. City of Asheville*, 113 N.C. App. 354, 360-61, 438 S.E.2d 467, 470 (citing *Ohio Casualty*, 99 N.C. App. at 136, 392 S.E.2d at 650), *disc. review denied*, 336 N.C. 602, 447 S.E.2d 385 (1994).

Plaintiff contends that *Ohio Casualty* is distinguishable because it involved an employee's underinsured motorist policy, while the instant case involves an underinsured motorist policy purchased by the employee's wife. This Court found in *Buckner* that whether an underinsured motorist policy is an employer's or an employee's "is unimportant." *Buckner*, 113 N.C. App. at 361, 438 S.E.2d at 470. Likewise, under G.S. § 97-10.2(f), we find that the distinction between an underinsured motorist policy purchased by the employee and one covering the employee but purchased by his spouse while a resident of the same household is unimportant. See N.C. Gen. Stat. § 20-279.21(b)(3) (1993). Contrary to plaintiff's contention, we find *Ohio Casualty* controlling.

Plaintiff also argues that G.S. § 97-10.2, which provides for an employer's lien against amounts its employee obtains from a *third party*, refers to payment only from the tortfeasor, and recovery from plaintiff's underinsured motorist carrier would not constitute payment from the third party. We disagree.

As this Court noted in *Ohio Casualty*, G.S. § 97-10.2 provides for subrogation of the workers' compensation insurance carrier to the employer's right to payment made to the employee by or "on behalf of" a third party. *Ohio Casualty*, 99 N.C. App. at 134, 392 S.E.2d at 649. Under G.S. § 20-279.21(b)(3), underinsured motorist coverage is

JENNINGS v. BACKYARD BURGERS OF ASHEVILLE

[123 N.C. App. 129 (1996)]

provided for damage which plaintiff “is legally entitled to recover” from the owner or operator of an uninsured motor vehicle. . . . Thus, by the uninsured motorist coverage . . . defendant assumed, up to its policy limits, the liability of the uninsured motorist for damages which the plaintiff is legally entitled to recover from the uninsured motorist.

Ensley v. Nationwide Mut. Ins. Co., 80 N.C. App. 512, 515, 342 S.E.2d 567, 569 (citation omitted), *cert. denied*, 318 N.C. 414, 349 S.E.2d 594 (1986). Accordingly, G.S. § 20-279.21(b)(3) “ ‘provides for a limited type of compulsory automobile *liability coverage* against uninsured motorists.’ ” *Id.* (citation omitted). An action under an underinsured motorist policy is “ ‘actually one for the tort allegedly committed by the uninsured motorist.’ ” *Baxley v. Nationwide Mutual Ins. Co.*, 104 N.C. App. 419, 424, 410 S.E.2d 12, 15 (1991) (quoting *Ensley*, 80 N.C. App. at 515, 342 S.E.2d at 569), *aff’d*, 334 N.C. 1, 430 S.E.2d 895 (1993). Thus, the benefits under plaintiff’s underinsured motorist policy are payable “on behalf of” the third party tortfeasor, and Nationwide has a lien on the proceeds of plaintiff’s underinsured motorist policy.

The Opinion and Award of the Full Commission is

Affirmed.

Judges WYNN and MARTIN, Mark D., concur.

OLIVER J. JENNINGS, EMPLOYEE/PLAINTIFF v. BACKYARD BURGERS OF ASHEVILLE,
EMPLOYER; U.S. FIDELITY & GUARANTY COMPANY, CARRIER/DEPENDANTS

No. COA95-849

(Filed 2 July 1996)

Workers’ Compensation § 144 (NCI4th)— hazardous route for ingress and egress—route over property not owned by employer—injury not compensable

Plaintiff’s injury by accident, which resulted from a hazardous condition on property adjacent to his employer’s premises, did not arise out of and in the course of employment, though defendant employer instructed him to use that route for ingress and egress.

JENNINGS v. BACKYARD BURGERS OF ASHEVILLE

[123 N.C. App. 129 (1996)]

Am Jur 2d, Workers' Compensation §§ 296, 305, 309, 310.

Appeal by defendants from Opinion and Award entered 2 May 1995 by the Full Industrial Commission. Heard in the Court of Appeals 27 March 1996.

In May of 1993 plaintiff was working as a cook at defendant Backyard Burgers. When he was hired approximately two years earlier, defendant employer instructed him to use the parking lot behind the building next door when going to and from work. The lot was accessible only by using a steep stairway on a hillside behind Backyard Burgers.

On 28 May 1993 plaintiff left work and walked to his car, which was parked in the lot where employees were instructed to park. As he walked down the steps leading to the designated parking lot, he slipped and fell down several stairs, injuring his back. There was no handrail on the stairway, and the individual steps were short, so that only half of plaintiff's foot would fit on a step.

Backyard Burgers was located on property owned by Herbert and June Coe of Tampa, Florida. Walden Partners, a development real estate business, was a ground lease tenant of the larger Coe property and sublet a small portion of it to Backyard Burgers. Neither the designated parking lot nor the stairway was owned, controlled, or maintained by defendant Backyard Burgers, but Walden gave Backyard Burgers permission to use the stairway and parking lot for employee parking.

As a result of his fall on the stairway, plaintiff sustained a lumbar strain that required chiropractic treatment. He was unable to work from 2 June through 13 June 1992, and reached maximum medical improvement as of 27 April 1994, when his chiropractor gave him a five percent permanent partial disability rating.

After an initial hearing, Deputy Commissioner Morgan S. Chapman denied plaintiff coverage under the Workers' Compensation Act, finding that defendant Backyard Burgers did not own, lease, maintain, or control the hillside on which the stairs were located.

On appeal, the Full Commission reversed the deputy commissioner's decision, finding that because Backyard Burgers instructed plaintiff to use the parking area that was accessible only by using the stairway in question, "defendant-employer knew or should have

JENNINGS v. BACKYARD BURGERS OF ASHEVILLE

[123 N.C. App. 129 (1996)]

known that plaintiff could reasonably assume adequate arrangements had been made by his employer which would create a legitimate right to use this parking lot and the stairway." Defendants appeal the Opinion and Award of the Full Commission.

Elizabeth G. McCrodden for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Allan R. Tarleton, for defendant appellants.

ARNOLD, Chief Judge.

The sole issue on appeal is whether plaintiff's injury by accident, which resulted from a hazardous condition on property adjacent to his employer's premises, arose out of and in the course of employment when defendant employer instructed him to use that route for ingress and egress. Defendants contend that the "premises" rule limits the compensability of an employee's injuries while going to and from work to those occurring on property the employer owns, controls, or maintains. In light of a recent Supreme Court decision on this issue, we must agree.

To be compensable under the Workers' Compensation Act, an injury must arise out of and in the course of employment. N.C. Gen. Stat. § 97-2(6) (1995). This state's "coming and going" rule provides that an injury occurring while an employee travels to and from work does not arise in the course of employment and therefore is not compensable. *Barham v. Food World*, 300 N.C. 329, 332, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). However, the "premises" exception to the "coming and going" rule applies when an employee is injured while going to and coming from work on the employer's premises. *Id.*, 266 S.E.2d at 679.

While we may not agree with our Supreme Court's recent decision in *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996), we are nevertheless bound by it. The *Royster* Court found noncompensable an employee's injury that occurred when he was struck by a car while crossing a public highway between his place of employment and a parking lot owned and operated by the defendant employer. *Id.* at 282-83, 470 S.E.2d at 31-32.

In reversing this Court's decision in *Royster*, the Supreme Court rejected the view adopted by many other jurisdictions that the "premises" exception extends to an injury occurring on an off-premises place that is on a necessary route between the place of

JENNINGS v. BACKYARD BURGERS OF ASHEVILLE

[123 N.C. App. 129 (1996)]

employment and the employer's parking lot. *See, e.g.,* 1 Larson, Workmen's Compensation Law, § 15.14(b) (1995); *Hughes v. Decatur Gen. Hosp.*, 514 So. 2d 935 (Ala. 1987); *Knoop v. Industrial Comm'n*, 589 P.2d 1325 (Ariz. App. 1978); *Wentworth v. Spark's Regional Medical Ctr.*, 894 S.W.2d 956 (Ark. App. 1995); *Lewis v. WCAB*, 542 P.2d 225 (Cal. 1975); *State Compensation Ins. Fund v. Walter*, 354 P.2d 591 (Col. 1960); *West Point Pepperell, Inc. v. McEntire*, 258 S.E.2d 530 (Ga. App. 1979); *Gray Hill, Inc. v. Industrial Comm'n*, 495 N.E.2d 1030 (Ill. App. 1986), *cert. denied*, 479 U.S. 1089, 94 L. Ed. 2d 154 (1987); *Harlan Appalachian Regional Hosp. v. Taylor*, 424 S.W.2d 580 (Ky. Ct. App. 1968); *Thomasee v. Liberty Mut. Ins. Co.*, 385 So. 2d 1219 (La. App. 1980), *cert. denied*, 392 So. 2d 675 (La. 1980); *Wiley Mfg. Co. v. Wilson*, 373 A.2d 613 (Md. 1977); *Smith v. Greenville Prods. Co.*, 462 N.W.2d 789 (Mich. App. 1990); *Lewis v. Walter Scott & Co.*, 141 A.2d 807 (N.J. Super. 1958); *Gaik v. National Aniline Div., Allied Chem. & Dye Corp.*, 5 A.D.2d 1039 (N.Y. 1958); *Blair v. Daugherty*, 396 N.E.2d 238 (Ohio App. 1979); *Swanson v. General Paint Co.*, 361 P.2d 842 (Okla. 1961); *Willis v. State Acc. Ins. Fund*, 475 P.2d 986 (Or. App. 1970); *Epler v. North Am. Rockwell Corp.*, 393 A.2d 1163 (Pa. 1978); *Branco v. Leviton Mfg. Co., Inc.*, 518 A.2d 621 (R.I. 1986); *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989).

The *Royster* Court instead relied on *Barham*, in which an employee of a store in a shopping center was injured while walking to her workplace after parking her car in the shopping center parking lot, which was used by both employees and customers. The *Barham* Court denied compensation because the employer did not own, maintain, or control the parking lot, and the employee was not performing any duties of her employment at the time of the injury and was not exposed to any danger greater than that of the general public. *Barham*, 300 N.C. at 333-34, 266 S.E.2d at 679-80. Finding *Barham* analogous, the *Royster* Court denied compensation "because defendant did not own or control the public street on which plaintiff was injured . . . [and] plaintiff was not performing any duties for defendant at the time of the injury and was not exposed to any greater danger than that of the public generally." *Royster*, 343 N.C. at 282, 470 S.E.2d at 31.

Under the narrow "premises" rule articulated by the *Royster* Court, we are compelled to deny compensation in the case at hand. Although defendant Backyard Burgers instructed plaintiff to use the adjacent parking lot for ingress and egress to the workplace, and the

IN RE FORECLOSURE OF AAL-ANUBIAIMHOTEPOKOROHAMZ

[123 N.C. App. 133 (1996)]

lot was accessible only by using the hazardous stairway, defendant did not own, maintain, or control the stairway or parking lot, and at the time of his injury plaintiff was not performing any duties for defendant. Thus, under *Royster*, plaintiff's injury does not fall within the "premises" exception to the "coming and going" rule and is not compensable.

In light of *Royster*, we must reverse the Opinion and Award of the Full Commission.

Reversed.

Judges MARTIN, John C., and SMITH concur.

IN THE MATTER OF THE FORECLOSURE OF LAND COVERED BY A CERTAIN DEED OF TRUST GIVEN BY ODECHI BOAZ M. AAL-ANUBIAIMHOTEPOKOROHAMZ AND WIFE, NGOZI AAL-ANUBIAIMHOTEPOKOROHAMZ WHEREIN RONALD K. CAMPBELL WAS NAMED AS TRUSTEE AS RECORDED IN BOOK 4735, PAGE 18, WAKE COUNTY REGISTRY

No. COA95-329

(Filed 2 July 1996)

Mortgages and Deeds of Trust § 61 (NCI4th)— failure of consideration—no valid debt—no foreclosure of deed of trust

Where defendants executed a promissory note and a deed of trust with the understanding that photo processing equipment would be rightfully assigned to them, but authorization for the assignment was never obtained and defendants did not have possession of the equipment, competent evidence did not exist in the record to support the conclusion that a valid debt existed between the parties; therefore, plaintiffs did not have a right to proceed with foreclosure under the power of sale provision contained in the deed of trust.

Am Jur 2d, Mortgages §§ 102, 1078, 1079.

Appeal by defendants from order entered 26 October 1994 by Judge Hight in Wake County Superior Court. Heard in the Court of Appeals 10 January 1996.

IN RE FORECLOSURE OF AAL-ANUBIAIMHOTEPOKOROHAMZ

[123 N.C. App. 133 (1996)]

Plaintiffs William A. Smith and Kay C. Smith entered into a lease agreement with Orient U.S. Leasing Corporation providing for the lease of photo processing equipment 24 June 1989. The financing for this agreement was obtained from Orix Commercial Credit Corp. Pursuant to the terms of the lease agreement, the plaintiffs as lessees were prohibited from assigning the lease, or the equipment referenced therein, without the express written consent of the lessor, Orient U.S. Leasing Corporation.

Thereafter, the plaintiffs attempted to assign the photo processing equipment to the defendants, the Aal-Anubiaimhotepokorohamzs. Under the terms of the assignment agreement, the defendants as assignees, were to attempt to secure written permission for the assignment, and when such permission was obtained, the plaintiffs were to be released from any obligations under the master lease.

To secure the payments required pursuant to the attempted assignment, the defendants executed a promissory note and deed of trust in favor of the plaintiffs. Under the terms of the promissory note, payment was to be due and payable as agreed in the assignment agreement and was not to exceed an amount of fifty thousand three hundred and twenty-four dollars (\$50,324.00). The deed of trust securing the debt, evidenced by the promissory note, was executed and filed in the office of the Wake County Register of Deeds. Defendants attempted to obtain an assignment of the photo processing equipment, but were informed that the assignment would not be approved. The defendants made four payments to the plaintiffs and then ceased making payments in April of 1991. By the express written terms of the promissory note and the deed of trust, such nonpayment constituted a default. The plaintiffs notified the defendants of the default and accelerated the debt.

After a hearing, the Clerk of Superior Court of Wake County authorized the Substitute Trustee to proceed with foreclosure of the deed of trust. The defendants appealed from this order of foreclosure to the Superior Court. At the close of the evidence and testimony in Superior Court, Judge Hight ordered that the Substitute Trustee proceed with the foreclosure of the deed of trust. Defendants appeal.

Smith Debnam Hibbert & Pahl, L.L.P., by John W. Narron and Michael D. Zetts III, for plaintiff appellees.

The Law Offices of Thomas H. Stark, by A. Lee Hill, for defendant appellants.

IN RE FORECLOSURE OF AAL-ANUBIAIMHOTEPKOROHAMZ

[123 N.C. App. 133 (1996)]

ARNOLD, Chief Judge.

“We note at the outset that the applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings.” *Walker v. First Federal Savings and Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585 (1989).

Defendants first argue that a valid debt does not exist because of a failure of consideration in the contractual transaction which gave rise to the execution of the deed of trust and the underlying promissory note. We agree and reverse the order of the trial court.

There are only four issues to be determined by the clerk at a foreclosure hearing: the existence of a valid debt of which the party seeking to foreclose is the holder; the existence of default; the trustee's right to foreclose, and the sufficiency of notice to the record owners of the hearing. N.C. Gen. Stat. § 45-21.16(d) (1991). “The clerk's findings are appealable to the Superior Court within ten days for a hearing *de novo*, but the court's authority is likewise limited.” *In re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 71, 284 S.E.2d 553, 555 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 149 (1982).

This Court, in *In Re Foreclosure of Kitchens*, 113 N.C. App. 175, 177, 437 S.E.2d 511, 512 (1993), terminated a Trustee's right to foreclose under G.S. § 45-21.16(d) because no valid debt existed due to a failure of consideration in the transaction underlying the execution of a promissory note and deed of trust. Ms. Kitchens, the mortgagor, had embezzled money from the mortgagee and she agreed to execute certain promissory notes and securing deeds of trust based on the understanding that she would not be prosecuted for embezzlement. *Id.* at 176-177, 437 S.E.2d at 512. Subsequently, criminal proceedings were instituted against Ms. Kitchens. *Id.* at 177, 437 S.E.2d at 512. “That by virtue of the fact criminal proceedings subsequently were instituted against Alyce B. Kitchens, the [notes and deed of trust] were without consideration.” *Id.* This Court agreed with the lower court's finding that these circumstances amounted to a failure of consideration and therefore no valid debt had been created. *Id.*, at 177-178, 437 S.E.2d at 512. “The mortgage's existence is based on the validity of the debt. If the debt terminates or is invalid, the mortgage is also invalid.” Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster's Real Estate Law In North Carolina*, § 13-4 (4th ed. 1994).

GREENMAN v. PONY EXPRESS

[123 N.C. App. 136 (1996)]

In the instant case, the defendants executed a promissory note and a deed of trust with the understanding that the photo processing equipment would be rightfully assigned to them. The defendants bargained for and contracted for the rights to the photo processing equipment, but authorization for the assignment was never obtained, nor do the defendants presently have possession of the equipment. Competent evidence does not exist in the record to support the conclusion that a valid debt exists between the parties. We find that there was a failure of consideration and that no valid debt was created between the parties. The plaintiffs, therefore, do not have the right to proceed with foreclosure under the power of sale provision contained in the deed of trust.

Because we find that plaintiffs do not have the right to foreclose on the deed of trust, we need not address defendants' other assignments of error. We reverse.

Reversed.

Judges LEWIS and WALKER concur.

ELLEN LOUISE GREENMAN, EMPLOYEE, PLAINTIFF, v. PONY EXPRESS, EMPLOYER, AND
TRANSPORTATION INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA94-1156

(Filed 2 July 1996)

Workers' Compensation § 260 (NCI4th)— vehicle lease payments from employer to plaintiff—no inclusion in calculation of average weekly wage

The Industrial Commission did not err in failing to include vehicle lease payments received from plaintiff's employer in calculating her average weekly wages under N.C.G.S. § 97-2(5) where plaintiff failed to present sufficient evidence of vehicle operation expenses so as to permit the Commission to determine what portion, if any, of the lease payments should have been included in the calculation.

Am Jur 2d, Workers' Compensation §§ 418-430.

GREENMAN v. PONY EXPRESS

[123 N.C. App. 136 (1996)]

Appeal by plaintiff from Opinion and Award entered 16 May 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 August 1995.

David Gantt Law Offices, by David Gantt, for plaintiff-appellant.

Harrell and Leake, by Larry Leake, for defendant-appellees.

JOHN, Judge.

Plaintiff appeals an Opinion and Award of the North Carolina Industrial Commission (the Commission). Plaintiff specifically challenges the Commission's decision not to include vehicle lease payments received from her employer, defendant Pony Express, in calculating her average weekly wages under N.C.G.S. § 97-2(5) (1991 & Cum. Supp. 1995). We affirm the Commission's decision.

Plaintiff's compensation arrangement as a courier for Pony Express involved payment of a predetermined weekly rate for running her delivery route; however, plaintiff routinely received this set amount in two separate checks. The first check was designated as "wages" and represented the product of the total hours plaintiff worked multiplied by the minimum wage. The second was denominated payment under a "Motor Vehicle Equipment Lease" (the "Lease"). According to the "Lease," plaintiff was reimbursed for use of her personal truck on her delivery route; in turn, she was responsible for gas, maintenance, and other expenses attributable to that vehicle. The weekly "Lease" check contained the total weekly rate due plaintiff minus the sum received as "wages" in the initial check. Under this payment scheme, the amount received by plaintiff as "wages" was consistently less than that characterized as "Lease" payments.

It is undisputed that plaintiff suffered a compensable injury to her back on 21 May 1991. She requested a hearing before the Commission, contending her average weekly wages under N.C.G.S. § 97-2(5) should be calculated to include not only the sum designated "wages," but also payments received under the "Lease." Following a hearing, the Deputy Commissioner rendered a decision excluding "Lease" payments from plaintiff's average weekly wages. The Full Commission affirmed that decision in a 16 May 1994 Opinion and Award. Plaintiff filed notice of appeal to this Court 6 June 1994.

GREENMAN v. PONY EXPRESS

[123 N.C. App. 136 (1996)]

It is well established that upon appeal from the Commission, our review is limited to two questions: (1) whether the Commission's findings of fact are supported by any competent evidence, and (2) whether those findings sustain its conclusions of law. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 128-29, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996).

We first observe the Commission properly acknowledged that lease payments to plaintiff in *excess* of her actual expenses in maintaining her truck would be includable as income. See G.S. § 97-2(5) ("Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings."); *Baldwin v. Piedmont Woodyards, Inc.*, 58 N.C. App. 602, 604, 293 S.E.2d 814, 816 (1982) ("[E]xpenses incurred in producing revenue should be deducted."); 2 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation*, § 60.12(a) (1995) ("A car allowance is includable as wage only if it exceeds actual truck, or travel expenses.").

At plaintiff's hearing, there was a dispute as to whether she might attempt to prove her actual operating expenses for the vehicle were less than the amount received as lease payments under circumstances where, by using the standard deduction, plaintiff had claimed on her income tax return that those expenses were greater than her lease payments.

The Commission's findings of fact in this regard included, *inter alia*, the following:

At the hearing, plaintiff provided only fragmentary evidence of her actual vehicle expenses during the 12-month period preceding her injury. (Some of such evidence related to a period prior to May 21, 1990). This was insufficient to permit the Deputy Commissioner or the undersigned to extrapolate what her actual expenses were in the relevant period. . . . The most reliable information in this record, based on information supplied IRS under penalty of perjury, is that plaintiff operated her vehicle in the 12 months prior to her injury at a net economic loss.

We do not believe a claimant who has utilized the legal standard deduction to report expenses for income tax purposes is barred from subsequently presenting evidence of her actual operating expenses before the Commission. Indeed, this Court has previously intimated that the amount the Internal Revenue Service [IRS] allows

GREENMAN v. PONY EXPRESS

[123 N.C. App. 136 (1996)]

as a deduction from income may not coincide with the actual loss suffered by a taxpayer. *See Baldwin*, 58 N.C. App. at 604, 293 S.E.2d at 816 (“depreciation as allowed by the [IRS] might not coincide with actual depreciation”).

However, the only documentary evidence submitted by plaintiff regarding expenses in operating her vehicle consisted of seven gasoline receipts dated the period between 2 April 1990 and 6 April 1990, more than a year prior to plaintiff’s injury, *see* G.S. § 97-2(5) (“‘Average weekly wages’ shall mean the earnings of the injured employee . . . during the period of 52 weeks immediately preceding the date of the injury . . .”). Plaintiff also testified she spent “about \$50.00 a week” on gasoline. When questioned about any additional automobile expenses, plaintiff simply replied, “Just buying oil, which was like maybe \$7.00 or \$8.00 because we did all our oil changes, did our tune-ups and everything ourself.”

The Commission’s finding of fact that “plaintiff provided only fragmentary evidence of her actual vehicle expenses” is supported by competent evidence. *See Pittman*, 122 N.C. App. at 129, 468 S.E.2d at 286. Further, the finding sustains the conclusion of law that plaintiff failed to present sufficient evidence of vehicle operation expenses so as to permit the Commission to determine what portion, if any, of the lease payments should have been included in the calculation under G.S. § 97-2(5) of her average weekly wages.

We note in conclusion that the two check method of compensation at issue herein, *i.e.*, one check designated as wages and the other as a lease payment, has been criticized elsewhere. *See LaPrarie v. Pony Express Courier*, 628 So.2d 192 (La. Ct. App. 1993), *writ denied*, 632 So.2d 765 (La. 1994) (claimant compensated in manner identical to that of plaintiff *sub judice*; court held lease payments “were used as a device to minimize [the] exposure [of Pony Express] to worker’s compensation liability” and entire lease payment included in calculation of claimant’s average weekly wages). However, as noted above, the record supports the Commission’s determination that plaintiff’s evidence of her actual vehicle expenses in the year preceding her injury was, at best, “fragmentary.” *See Pittman*, 122 N.C. App. at 129, 468 S.E.2d at 286.

Affirmed.

Judges EAGLES and LEWIS concur.

LUCAS v. CITY OF CHARLOTTE

[123 N.C. App. 140 (1996)]

TERESA C. LUCAS, PLAINTIFF v. THE CITY OF CHARLOTTE, NORTH CAROLINA AND
EDGAR CLIFFORD BAKER, DEFENDANTS

No. COA95-1072

(Filed 2 July 1996)

Costs § 37 (NCI4th)— attorney's services prior to arbitration—award of fees proper

The Uniform Arbitration Act does not forbid an award of attorney's fees for services provided by an attorney before the case is referred to binding arbitration.

Am Jur 2d, Costs §§ 5, 58, 63, 64, 66-68.

Appeal by defendants from order entered 13 July 1995 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 May 1996.

Dean & Gibson, by Michael G. Gibson and Michael J. Selle, for defendants-appellants.

Myers and Hulse, by William F. Hulse, for plaintiff-appellee.

WYNN, Judge.

This appeal arises from an action by plaintiff Teresa Lucas alleging that defendant Edgar Clifford Baker, while acting within the scope of his employment with defendant City of Charlotte ("defendant"), negligently operated a motor vehicle causing personal injuries to her and damage to her car.

With the agreement of the parties, the Mecklenburg County Superior Court referred their dispute to binding arbitration which resulted in a \$5,312 award to plaintiff for her damages. Plaintiff next requested payment of her attorney fees, but defendant refused.

Thereafter, plaintiff returned to superior court and moved for attorney's fees and interest. Superior Court Judge Robert P. Johnston granted that motion by awarding plaintiff \$3,150. Defendant appeals to this Court.

The issue on appeal is whether the Uniform Arbitration Act (UAA) forbids an award of attorney's fees for services provided by an

LUCAS v. CITY OF CHARLOTTE

[123 N.C. App. 140 (1996)]

attorney before the case is referred to binding arbitration. We hold that it does not, and therefore affirm the order of the trial judge.

The UAA applies to any agreement to arbitrate a dispute in North Carolina, unless preempted by the Federal Arbitration Act in a given case, *Bennish v. N.C. Dance Theater*, 108 N.C. App. 42, 44, 422 S.E.2d 335, 337 (1992), with certain exceptions not relevant here. N.C. Gen. Stat. § 1-567.2 (1983). N.C.G.S. § 1-567.11 is the only section of the UAA which refers to attorney's fees. *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 152, 423 S.E.2d 747, 749 (1992), *reh'g denied*, 333 N.C. 349, 426 S.E.2d 708 (1993).

In *Nucor*, our Supreme Court held that N.C.G.S. § 1-567.11 disallows attorney's fees for work performed in arbitration. *Id.* at 153-54, 423 S.E.2d at 750. Defendants contend that N.C.G.S. § 1-567.11 similarly forbids an award of attorney's fees under N.C. Gen. Stat. § 6-21.1 (1986) for services provided by an attorney before the case is referred to binding arbitration.

N.C.G.S. § 1-567.11 states: "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."

N.C.G.S. § 6-21.1 states in relevant part:

In any personal injury or property damage suit . . . upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, *instituted in a court of record*, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee

Id. (emphasis supplied).

In construing N.C.G.S. § 6-21.1 and N.C.G.S. § 1-567.11 *in pari materia*, since both statutes deal with the same subject matter: Attorney's fees, see *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984), we find the case of *Bass v. Goss*, 105 N.C. App. 242, 412 S.E.2d 145 (1992) instructive.

In *Bass*, the superior court referred plaintiff's personal injury claim to arbitration where she received an award of \$2,559. *Id.* at 243, 412 S.E.2d at 145. Following confirmation of the arbitrator's award, the superior court denied plaintiff's motion for attorney's fees under

LUCAS v. CITY OF CHARLOTTE

[123 N.C. App. 140 (1996)]

N.C.G.S. § 6-21.1 pending remand to the arbitrator. *Id.* On appeal this Court stated:

While [the superior court judge's] order . . . is not clear as to whether plaintiff's motion for attorney's fees was denied or merely denied pending remand to the arbitrator, the appeal raises the question of whether the judge should award attorney's fees in this type of case as part of the costs. *We hold the judge has discretion whether to and in what amount to award attorney's fees in this type of case.*

Insofar as [the superior court judge's] order denied the motion [for attorney's fees], it is reversed, and the cause is remanded to the Superior Court for entry of an order in accordance with G.S. 6-21.1.

Id. at 244, 412 S.E.2d at 146 (emphasis supplied).

Bass thus held that attorney's fees may be awarded under N.C.G.S. § 6-21.1 even in cases referred to arbitration. In a later opinion, our Supreme Court in *Nucor* expressly disavowed the "reliance by . . . the Court of Appeals, upon N.C.G.S. § 6-21.2 as authority for the proposition that attorneys's fees are awardable by the superior court for work *performed in* arbitration proceedings" *Nucor*, 333 N.C. at 154, 423 S.E.2d at 750 (emphasis supplied). Even assuming without deciding that the Supreme Court's limitation on attorney's fees under N.C.G.S. § 6-21.2 applies also to attorneys fees awarded under N.C.G.S. § 6-21.1, the *Nucor* decision, by implication, still permits the award of attorney fees under either section for work *performed outside* of the arbitration proceeding. In the instant case, the trial judge made the following relevant findings of fact:

1. The Plaintiff filed a personal injury Complaint against the Defendants on July 31, 1992, and in her prayer for relief prayed for attorney fees pursuant to N.C.G.S. § 6-21.1
2. All parties agreed to submit this case to binding arbitration.
3. Former Superior Court Judge, Robert W. Kirby heard this case on January 12, 1995, and issued an arbitration award finding that the Plaintiff was injured and damaged as a result of the negligence of the Defendants, and that Plaintiff is entitled to recover Five Thousand Dollars (\$5,000) for personal injuries and Three Hundred Twelve Dollars (\$312) for property damage.

LUCAS v. CITY OF CHARLOTTE

[123 N.C. App. 140 (1996)]

4. Since the arbitration award was less than Ten Thousand Dollars (\$10,000), Plaintiff's counsel requested Defendants to pay his attorney fees pursuant to N.C.G.S. § 6-21.1.

...

9. Plaintiff may be considered for the award of a reasonable attorney fee *up to the time of Judge Zoro G. Guice's Order of October 20, 1994, ordering the parties to submit to binding arbitration.*

(emphasis supplied).

Based on these findings of facts, the trial court concluded:

2. The Plaintiff is not entitled to attorney fees for legal services performed after the appointment of the arbitrator

Based on this conclusion of law, Judge Johnston ordered defendant to pay plaintiff's attorney's fees for services performed *before the case was referred to arbitration*. Since we find that N.C.G.S. § 1-567.11 has no application to work performed by an attorney before a case is referred to arbitration, we conclude that the trial court's award of attorney's fees under N.C.G.S. § 6-21.1 was proper in this case.

Defendant further contends that the trial court's holding impermissibly modified the arbitrator's decision. We disagree. The trial court did not award attorney's fees for any of the time spent arbitrating the case. As a result, the trial court award does not concern arbitration in any way, and does not affect the arbitrator's award. This assignment of error is without merit.

The decision of the trial court is,

Affirmed.

Judges EAGLES and SMITH concur.

STATE v. BARNES

[123 N.C. App. 144 (1996)]

STATE OF NORTH CAROLINA v. THOMAS SHANE BARNES

No. COA95-1080

(Filed 2 July 1996)

**Searches and Seizures § 77 (NCI4th)— impaired driving—
checking station—compliance with guidelines—motion to
suppress improperly granted**

The trial court's findings did not support its conclusion that the highway patrol checking station where defendant was detained and checked for impaired driving was not conducted in accordance with required guidelines; instead, the findings showed that there was substantial compliance, there was no Fourth Amendment violation, and the trial court's order granting defendant's motion to suppress is reversed. N.C.G.S. § 20-16.3A.

Am Jur 2d, Searches and Seizures § 52.

Appeal by the State from order entered 7 June 1995 by Judge John Mull Gardner in Cleveland County Superior Court. Heard in the Court of Appeals 17 May 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Joseph P. Dugdale, for the State.

Horn, West, Horn, Pack & Brown, P.A., by C. A. Horn, for defendant-appellee.

WALKER, Judge.

On 5 September 1993 defendant was charged with driving while impaired. Following a plea of not guilty, defendant filed a motion to suppress on the basis that the stopping and detaining of defendant's vehicle without probable cause or reasonable suspicion at a highway patrol checking station violated his constitutional rights. The trial court granted the motion and pursuant to N.C. Gen. Stat. § 15A-979 (1988), the State appealed.

The sole issue to be addressed is whether the trial court erroneously concluded that the stopping and detaining of defendant at the checking station was an unreasonable seizure under the fourth amendment.

STATE v. BARNES

[123 N.C. App. 144 (1996)]

The Supreme Court in *Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed.2d 660 (1979), recognized that states should be permitted to develop methods for “spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.” *Id.* at 663, 59 L.Ed.2d at 673-74.

The establishment and conduct of roadblocks and checking stations are governed by the North Carolina General Statutes Section 20-16.3A and State Highway Patrol Directive No. 63. (Directive 63). N.C. Gen. Stat. § 20-16.3A (1993) provides:

A law-enforcement agency may make impaired driving checks of drivers of vehicles on highways and public vehicular areas if the agency:

(1) Develops a systematic plan in advance that takes into account the likelihood of detecting impaired drivers, traffic conditions, number of vehicles to be stopped, and the convenience of the motoring public.

(2) Designates in advance the pattern both for stopping vehicles and for requesting drivers that are stopped to submit to alcohol screening tests. The plan may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to submit to an alcohol screening test.

(3) Marks the area in which checks are conducted to advise the public that an authorized impaired driving check is being made.

In addition, Directive 63 requires that “[a]ll roadblocks shall be marked by signs, activated emergency lights, marked Patrol vehicles parked in conspicuous locations, or other ways to assure motorists are aware that an authorized roadblock is being conducted. A blue light on at least one Patrol vehicle shall be operated at all times.”

The court concluded that the checking station in this case failed to meet the established guidelines as set forth above. On appeal the State contends that the court’s conclusion is contradicted by the court’s own findings of fact. We agree.

As support for its argument, the State cites the case of *State v. Sanders*, 112 N.C. App. 477, 435 S.E.2d 842 (1993). In *Sanders*, this

STATE v. BARNES

[123 N.C. App. 144 (1996)]

Court concluded that the defendant's fourth amendment rights were not violated following his being stopped at a driver's license check where there were no signs warning the public that a license check was being conducted. The court based its conclusion in part on the following findings:

In the case at hand, the two troopers, following guidelines established by their agency, selected a location and time during daylight hours for a license check. The troopers detained every automobile that passed through the check point, with the exception of those that came through while the officers were issuing citations to the operators of other vehicles. We can find no Fourth Amendment violation in the troopers' actions, and we overrule this assignment of error.

Sanders, 112 N.C. App. at 480, 435 S.E.2d at 844.

Similarly, in the present case, the court found that on 5 September 1993, Sergeant Bullock, acting shift supervisor, decided to organize a checking station, taking into consideration the likelihood of detecting persons who were violating the motor vehicle laws, the traffic conditions, the volume of traffic that would pass through the checking station, and the convenience of the public. The officers intended to stop all vehicles that approached the checking station from either direction to detect driver's license and registration violations as well as other motor vehicle violations including driving while impaired.

Following Bullock's decision, a checking station was established on Oak Grove Road at approximately 12:45 a.m. taking into account that there is a higher incidence of impaired driving on the weekend, particularly during the early morning hours. Bullock's unmarked patrol vehicle was parked in the paved median dividing the lanes of Oak Grove Road and another unmarked patrol vehicle was parked on the shoulder of Oak Grove Road. At least one of the vehicles had its blue lights on in accordance with Directive 63.

Defendant drove his vehicle to the checking station where he was stopped and asked to produce his driver's license and registration. Bullock noticed that defendant's eyes were glassy and bloodshot and he detected the odor of alcohol. When asked how much he had to drink, defendant responded, "none." Thereafter, another officer took over the investigation and defendant was later charged with driving while impaired. There is no evidence or finding that the checking sta-

COTTLE v. THOMPSON

[123 N.C. App. 147 (1996)]

tion was not noticeable, resulted in any unusual delay for defendant or other motorists, created any unsafe condition(s) or was otherwise unreasonable.

Upon careful review of the evidence, we find that the court's findings do not support its conclusion that the checking station was not conducted in accordance with required guidelines. Instead, the findings show that there was substantial compliance with N.C. Gen. Stat. § 20-16.3A and Directive 63. Accordingly, we find no fourth amendment violation and we reverse the trial court's order granting defendant's motion to suppress.

Reversed.

Judges GREENE and MARTIN, JOHN C. concur.

AMY K. COTTLE, PLAINTIFF v. LAWRENCE K. THOMPSON, III, M.D., DURHAM PLASTIC SURGERY ASSOCIATES, INC., AND WALTER J. LOEHR, M.D., DEFENDANTS

No. COA95-1132

(Filed 2 July 1996)

**Pleadings § 15 (NCI4th); Process and Service § 35 (NCI4th)—
request for statement of monetary relief sought—request
not filed—dismissal for failure to respond—error**

A request for a statement of monetary relief sought is not a discovery document excluded from the filing requirement of Rule 5 and is therefore a paper that must be filed with the court either before service or within five days thereafter; therefore, in this case where no request was ever filed with the court, the trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought. N.C.G.S. § 1A-1, Rules 5(d), 8(a)(2).

Am Jur 2d, Pleading §§ 28 et seq.; Process §§ 1-11.

Appeal by plaintiff from order entered 7 June 1995 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 23 May 1996.

COTTLE v. THOMPSON

[123 N.C. App. 147 (1996)]

On 21 February 1995, plaintiff, acting *pro se*, filed her summons and complaint alleging, *inter alia*, that she was injured as a result of defendant Loehr's negligence. Earlier, plaintiff had filed a similar lawsuit with benefit of counsel, but then had taken a voluntary dismissal without prejudice pursuant to Rule 41(a). In response to plaintiff's present complaint, defendant Loehr, on 24 March 1995, filed and served his answer accompanied by interrogatories, a motion for a discovery scheduling conference and a motion to dismiss pursuant to Rule 12(b)(6). On this date, defendant Loehr also allegedly served a request for a statement of monetary relief sought pursuant to Rule 8(a)(2). On 24 April 1995, defendant Loehr served notice upon plaintiff that defendant Loehr's motion for discovery scheduling conference would be heard on 6 June 1995. Further, on 24 May 1995, defendant Loehr served notice upon plaintiff that his motion to compel discovery would also be heard on 6 June 1995. Defendants Thompson and Durham Plastic Surgery Associates also notified plaintiff that a hearing was set for 6 June 1995 pertaining to their motion to dismiss for plaintiff's failure to respond to defendants' request for a statement of monetary relief sought.

On 6 June 1995, plaintiff appeared without counsel and orally moved to continue the hearing on "the sole basis that she wanted additional time to consult with counsel concerning the case." The trial court denied plaintiff's motion and defendant Loehr then orally moved to dismiss plaintiff's action due to her failure to respond to his request for a statement of monetary relief sought. On 7 June 1995, the trial court granted defendant Loehr's motion to dismiss.

Plaintiff appeals.

Grover C. McCain, Jr., for plaintiff-appellant.

Young, Moore and Henderson, P.A., by David P. Sousa, for defendant-appellee Walter J. Loehr, M.D.

EAGLES, Judge.

Plaintiff first argues that the trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought. Plaintiff argues that no request for a statement of monetary relief sought was ever filed with the court and that, absent the filing, the trial court could not properly grant defendant Loehr's motion to dismiss. We agree.

COTTLE v. THOMPSON

[123 N.C. App. 147 (1996)]

Rule 5(d) governs the filing of documents with the court and states in pertinent part that:

All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party, including requests for admissions, shall be filed with the court either before service or within five days thereafter, except that depositions, interrogatories, requests for documents, and answers and responses to those requests may not be filed unless ordered by the court or until used in the proceeding.

G.S. 1A-1, Rule 5(d) (1991). This statutory language creates a general rule in favor of filing, subject to limited exceptions for discovery documents. G.S. 1A-1, Rule 5(d) cmt. (1985). Under the statutory language of Rule 5(d), the threshold question is whether a paper must be served on a party. If it must be served, the paper also “*shall* be filed with the court either before service or within five days thereafter” G.S. 1A-1, Rule 5(d) (emphasis added). The plain language of Rule 5(d) is mandatory in this regard.

Rule 8(a)(2) provides the authority for a party to request from plaintiff a statement of monetary relief sought.

[A]t any time after service of the claim for relief, any party may request of the claimant a written statement of the monetary relief sought, and the claimant shall, within 30 days after such *service*, provide such statement Such statement may be amended in the manner and at times as provided by Rule 15.

G.S. 1A-1, Rule 8(a)(2) (1989) (emphasis added). No elaborate methods of statutory construction are necessary here, as it is clear that a request for a statement of monetary relief sought must be served upon the claimant. The statutory service requirement provides not only notice, but a benchmark from which the 30 day response period may be calculated. Accordingly, having determined that a request for a statement of monetary relief sought must be served, we conclude that the request must also be filed with the court unless it can be shown to be a discovery document of the type specifically excepted in Rule 5(d).

We hold that a request for a statement of monetary relief sought cannot be considered a discovery document of the type specifically excepted in Rule 5(d). The only documents not subject to the Rule 5(d) filing requirement are “depositions, interrogatories, requests for documents, and answers and responses to those requests” G.S.

LONG v. GILES

[123 N.C. App. 150 (1996)]

1A-1, Rule 5(d). The statute contains no other inclusive language in conjunction with the specifically identified discovery devices.

“[D]epositions, interrogatories, requests for documents and answers and responses to those requests . . .” are all covered by Article 5 of Chapter 1A, which Article is entitled “Depositions and Discovery.” A request for a statement of monetary relief sought, however, is found under Chapter 1A, Article 3 entitled “Pleadings and Motions.” Moreover, as we have stated, Rule 8(a)(2) provides the specific authority for this type of request and Rule 8 is entitled “General rules of pleadings.” Rule 8(a)(2) also cross-references Rule 15 with regard to the time and manner in which a complainant may amend a statement of monetary relief sought. Rule 15, of course, governs “Amended and supplemental pleadings.” Accordingly, we conclude that a request for a statement of monetary relief sought is not a discovery document excluded from the filing requirement of Rule 5 and is therefore a paper that must be filed with the court either before service or within five days thereafter.

We hold that the trial court erred in dismissing plaintiff’s claim for failure to respond to defendant Loehr’s request for a statement of monetary relief sought. Accordingly, this cause is reversed and remanded to the Superior Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges WYNN and SMITH concur.

LUTHER YOUNGS LONG AND WIFE, MARGARET D. LONG, PLAINTIFFS V. PATRICIA S. GILES, EXECUTRIX OF THE ESTATE OF SHERRILL WARREN GILES AND AEF, INC., D/B/A ECONO LODGE, DEFENDANTS

No. COA95-591

(Filed 2 July 1996)

Appeal and Error § 121 (NCI4th)— employer and employee defendants—employer’s liability derivative—summary judgment for employer not appealable

Because the corporate employer’s *respondeat superior* liability was derivative of a finding of liability against the employee’s

LONG v. GILES

[123 N.C. App. 150 (1996)]

estate, there was no possibility of inconsistent verdicts, and plaintiff thus had no substantial right to have the liability of both employer and employee determined in the same trial; therefore, plaintiff's appeal from the summary judgment for defendant employer was dismissed as premature.

Am Jur 2d, Appellate Review §§ 169, 170.

Appeal by plaintiffs from order entered 2 February 1995 by Judge Henry W. Hight, Jr., in Granville County Superior Court. Heard in the Court of Appeals 26 February 1996.

This case arises from an automobile accident on 2 February 1992 in which a car driven by Sherrill Warren Giles allegedly ran a stop sign and collided with plaintiffs' car. Mr. Giles was killed, and plaintiffs were both severely injured.

Defendant AEF, Inc. (hereinafter AEF) is the owner and operator of the Econo Lodge motel in Creedmoor, North Carolina, where Mr. Giles was the assistant manager and his wife, Patricia S. Giles, was the manager. Mr. and Mrs. Giles lived in an apartment at the motel. Mr. Giles's job duties included general maintenance of the motel property, checking behind the housekeepers, and assisting with the day-to-day operations of the motel as needed.

On the day of the accident, Mr. Giles drove his personal vehicle to his friend William E. King's house for dinner. He arrived at about 6 p.m., ate dinner, and left about forty-five minutes later. He told Mr. King that he could not stay long because he had to return to the motel to relieve a desk clerk who was taking a break at 7 p.m. Mr. King also testified, however, that he believed Mr. Giles was going "nowhere but home" that evening.

On his way back to the Econo Lodge, Mr. Giles was involved in an automobile collision in which he was killed and both plaintiffs were severely injured. Mrs. Giles testified that at no time during that day, including the time of the accident, did Mr. Giles use his vehicle to perform any duties of his employment.

Plaintiffs brought a civil action against Mrs. Giles, as executrix of Mr. Giles's estate, and AEF, Inc., d/b/a Econo Lodge on 30 November 1994. Defendant AEF moved for summary judgment on the ground that there was no genuine issue of material fact as to whether Mr. Giles was acting within the scope of his employment at the time of the accident. Superior Court Judge Henry W. Hight, Jr., granted the

LONG v. GILES

[123 N.C. App. 150 (1996)]

motion for summary judgment and dismissed defendant AEF from the action. Mrs. Giles was not dismissed as defendant, and no final judgment has been entered as to her. Plaintiffs appeal summary judgment in favor of defendant AEF.

John H. Pike for plaintiff appellants.

Maupin Taylor Ellis & Adams, P.A., by James A. Roberts, III and Richard N. Cook, for defendant appellee AEF, Inc.

ARNOLD, Chief Judge.

It is well established that the entry of summary judgment for fewer than all defendants is not a final judgment and is not immediately appealable unless it affects a substantial right or is certified pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990). *See Johnston County v. McCormick*, 65 N.C. App. 63, 308 S.E.2d 872 (1983). Because the trial court did not certify the appeal pursuant to Rule 54(b), and we conclude that there is no substantial right involved, the appeal is premature.

A finding of liability against defendant AEF, as Mr. Giles's employer, is only possible if Mr. Giles's estate is found liable, and the injuries arose out of and in the course of his employment. In other words, defendant AEF's liability is derivative of Mr. Giles's liability, and the primary claim against the estate must first be determined before any claim against AEF is possible. Only if the court determines that plaintiffs may recover from the estate can their right to recover from defendant AEF be affected by the summary judgment.

If plaintiffs do not recover against Mr. Giles's estate, they cannot seek to recover against defendant AEF under a *respondeat superior* theory, and an appeal of summary judgment would be moot. Moreover, if summary judgment for defendant AEF is in error, plaintiffs can preserve their right to complain of the error by a duly entered exception, and may appeal after a successful judgment on the primary claims against Mr. Giles's estate. *See Sportcycle Co. v. Schroader*, 53 N.C. App. 354, 357, 280 S.E.2d 799, 801 (1981).

We recognize that in *Hooper v. C. M. Steel, Inc.*, 94 N.C. App. 567, 568-69, 380 S.E.2d 593, 594 (1989), this Court held that the plaintiffs, who sued both an employee and his employer for injuries received in an automobile accident, had a substantial right to have the liability of both defendants determined in the same trial to avoid the possibility of inconsistent verdicts. We did not address the issue of derivative lia-

BURTON v. BURTON

[123 N.C. App. 153 (1996)]

bility in *Hooper* but instead applied the general concept that there is a substantial right to have the liability of both defendants determined in the same trial to avoid the possibility of inconsistent verdicts. We now consider more carefully the issue of derivative liability and the possibility of inconsistent verdicts in this case, and we conclude that no substantial right is involved. *See generally Sportcycle*, 53 N.C. App. 354, 280 S.E.2d 799.

Because the issue of defendant AEF's liability is derivative of a finding of liability against Mr. Giles's estate, there is no possibility of inconsistent verdicts, and no substantial right is involved that would make an appeal of summary judgment appropriate at this time.

Appeal dismissed.

Judges WYNN and MARTIN, Mark D., concur.

LEROY M. BURTON, SR., JO EVELYN BURTON & BURTON AND ASSOCIATES, INC.,
PLAINTIFFS v. BARBARA S. BURTON, BARBARA S. BURTON, EXECUTRIX OF
THE ESTATE OF LEROY M. BURTON, JR., DECEASED DEFENDANTS v. EVA W.
BURTON-JUNIOR, LORI MICHELLE BURTON AND LESLIE MONIQUE BURTON,
INTERVENOR-DEFENDANTS

No. COA95-1188

(Filed 2 July 1996)

**Trusts and Trustees § 129 (NCI4th)— no allegations of fraud,
mistake, or undue influence—engrafting of parol trust
error**

A parol trust in favor of the grantor plaintiffs could not be engrafted upon the written deeds conveying title to defendants in the absence of allegations of fraud, mistake, or undue influence.

Am Jur 2d, Trusts §§ 68 et seq.

Appeal by intervenor-defendant-appellants from order filed 13 July 1995 in Wake County District Court by Judge L. W. Payne. Heard in the Court of Appeals 6 June 1996.

BURTON v. BURTON

[123 N.C. App. 153 (1996)]

*Robert E. Griffin for plaintiff-appellees.**Carlton E. Fellers for defendant-appellees.**Brady, Schilawski, Earls and Ingram, by John Randolph Ingram, II, for intervenor-defendant-appellants.*

GREENE, Judge.

Eva W. Burton-Junior, Lori Michelle Burton and Leslie Monique Burton (intervenor-defendants) appeal from an order granting summary judgment for Leroy M. Burton, Sr., Jo Evelyn Burton and Burton and Associates, Inc. (plaintiffs).

Plaintiffs Leroy Burton, Sr. and Jo Burton conveyed three tracts of land to Joan Elizabeth Burton and Leroy M. Burton, Jr., their daughter and son, on 21 November 1992. The deed stated that it was a "NORTH CAROLINA NON-WARRANTY DEED" and conveyed the land in fee simple for valuable consideration. A real estate excise tax stamp for \$30.00 was on the deed. By general warranty deed, Leroy Burton, Sr. and Jo Burton conveyed on 30 December 1992 two more tracts of land to Joan Burton and Leroy Burton, Jr. The deed stated that the conveyance was in fee simple for valuable consideration and had an excise tax stamp in the amount of \$20.00 on it. On 29 December 1992, by general warranty deed, Burton & Associates conveyed in fee simple for valuable consideration two tracts of land to Joan Burton and Leroy Burton, Jr. An excise tax stamp in the amount of \$50.00 was on the deed. In all, seven tracts of land were conveyed by plaintiffs to Joan Burton and Leroy Burton, Jr. in 1992.

On 27 March 1994 Leroy Burton, Jr. died, and his wife, Barbara Burton (defendant), qualified as executrix and was his sole beneficiary. Plaintiffs filed a complaint alleging that plaintiffs had conveyed all seven tracts of land to Leroy Burton, Jr. and Joan Burton "to be held in trust for the Plaintiffs." Plaintiffs alleged that all parties involved in the conveyances "knew that the properties conveyed were to be held in trust for the Plaintiffs" and asked that the trial court order such properties be reconveyed by defendant to plaintiffs. Attached to plaintiffs' complaint was a writing dated 21 November 1992 and labeled "AFFIDAVIT," although it is not sworn. The writing states that Leroy Burton, Sr. "hereby certif[ies] and affirm[s] that I conveyed 4 tracts of property to my son, Leroy M. Burton, Jr., and daughter Joan Elizabeth Burton. This conveyance created a trust in

BURTON v. BURTON

[123 N.C. App. 153 (1996)]

these properties which upon their death, with the properties reverting to me or the survivor of my children.”

Defendant answered, admitting the plaintiffs’ allegations and requesting that the trial court grant appropriate relief. Thereafter, on 31 October 1994 plaintiffs moved the court for summary judgment. Intervenor-defendants moved to intervene on the grounds that they are judgment creditors of Leroy Burton, Jr.’s estate to the extent of \$100,000.00 and “have a direct interest in the preservation of Estate assets.” Intervenor-defendants’ motion to intervene was allowed.

After considering the plaintiffs’ complaint, defendants’ answer, the motion to intervene, the order allowing intervention and both motions for summary judgment, the trial court granted summary judgment for the plaintiffs. At the summary judgment hearing, intervenor-defendants “timely objected to the introduction, admission and consideration of Plaintiffs’ Complaint and Defendant’s Answer in support of Plaintiffs’ Motion for Summary Judgment,” which was overruled by the trial court.

The issue is whether a parol trust in favor of the grantor can be engrafted upon the written deeds conveying title to Joan Burton and Leroy Burton, Jr.

[E]xcept in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass.

Day v. Powers, Sec. of Revenue, 86 N.C. App. 85, 87, 356 S.E.2d 399, 401 (quoting *Gaylord v. Gaylord*, 150 N.C. 222, 227, 63 S.E. 1028, 1031 (1909)), *disc. rev. denied*, 320 N.C. 791, 361 S.E.2d 73 (1987).¹

In this case the deeds to the properties reveal that plaintiffs conveyed absolute title to Joan Burton and Leroy Burton, Jr. and the engrafting of a parol trust is for the benefit of the grantor (plaintiffs)

1. The plaintiffs rely on *McCorkle v. Beatty*, 225 N.C. 178, 33 S.E.2d 753 (1945), for support of their argument that a “parol trust may be imposed upon legal title upon proof [by clear and convincing evidence] of an oral promise to hold in trust for promisee.” Although *McCorkle* does contain broad language that appears to support the plaintiffs’ argument, it is factually distinguishable in that it involved a third party seeking to impose a trust upon a transaction between two other parties. *Id.* at 181, 33 S.E.2d at 754. The facts in this case do not involve anyone not a party to the deed.

STATE v. MISENHEIMER

[123 N.C. App. 156 (1996)]

only. Because there are no allegations of fraud, mistake or undue influence, a parol trust for the benefit of the plaintiffs cannot be imposed. Therefore, summary judgment for the plaintiffs was error and this case is remanded for entry of summary judgment for the intervenor-defendants.

Reversed and remanded.

Judges MARTIN, John C., and WALKER concur.

STATE OF NORTH CAROLINA v. HORACE DARRELL MISENHEIMER

No. COA95-1243

(Filed 2 July 1996)

Criminal Law § 1286 (NCI4th)— adjudication as habitual felon—different elements used to support underlying felony

Where defendant was convicted of habitual impaired driving and then adjudicated a habitual felon, and defendant did not argue nor did the record show that his prior record level was established by using convictions necessary to adjudge him a habitual felon, there was thus no violation of N.C.G.S. § 14-17.6 which prohibits a defendant's felony sentence from being enhanced on the ground that he is a habitual felon when elements necessary to prove that he is a habitual felon are the same as those elements which were used to support the underlying felony for which defendant is being sentenced.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 26-27.

Appeal by defendant from judgment entered 1 August 1995 in Cabarrus County Superior Court by Judge Catherine C. Eagles. Heard in the Court of Appeals 4 June 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Linda M. Fox, for the State.

William D. Arrowood for defendant-appellant.

STATE v. MISENHEIMER

[123 N.C. App. 156 (1996)]

GREENE, Judge.

Horace Darrell Misenheimer (defendant) appeals from the trial court's 1 August 1995 Judgment and Commitment, sentencing him to a minimum of eighty (80) months and maximum of one hundred five (105) months in prison for habitual impaired driving, in violation of N.C. Gen. Stat. § 20-138.5, driving while license revoked, in violation of N.C. Gen. Stat. § 20-28, and being an habitual felon, in violation of N.C. Gen. Stat. § 14-7.1.

Defendant was charged with driving while license revoked on 1 April 1995 and indicted for felony habitual impaired driving, for facts arising out of the 1 April charge, and being an habitual felon on 30 May 1995. The felony habitual driving indictment alleged three offenses involving impaired driving; (1) habitual impaired driving on 8 September 1994, (2) habitual impaired driving on 29 July 1994, and (3) habitual impaired driving on 26 May 1993. The habitual felony indictment alleged three felony convictions; (1) sale of cocaine on 22 April 1992, (2) habitual impaired driving on 26 May 1993, and (3) habitual impaired driving on 8 September 1994. On 1 August 1995, after the conviction of habitual impaired driving and prior to the submission of the habitual felon issue to the jury, defendant made a motion for the trial court to dismiss the indictment for habitual felon, because it was predicated upon the same crimes which had previously been used to convict defendant of habitual impaired driving.

The issue is whether N.C. Gen. Stat. § 14-7.6 prohibits a defendant's felony sentence from being enhanced on the grounds that he is an habitual felon when elements necessary to prove that he is an habitual felon are the same as those elements which were used to support the underlying felony, for which defendant is being sentenced.

Section 14-7.6 provides that an habitual felon be "sentenced as a Class C felon" and that "[i]n determining the prior record level [under the Structured Sentencing Act], convictions used to establish a person's status as an habitual felon shall not be used." N.C.G.S. § 14-7.6 (Supp. 1995). Under our Structured Sentencing Act, a defendant's prior record level is used to increase the presumptive range of a sentence that a felon will receive. N.C.G.S. § 15A-1340.17 (Supp. 1995). The defendant may then be sentenced outside of the presumptive range, if the trial court determines aggravating or mitigating factors exist. *Id.* Thus, the legislature has provided, in section 14-7.6, that a

STATE v. MISENHEIMER

[123 N.C. App. 156 (1996)]

defendant shall not have his felony level enhanced to Class C on the grounds he is an habitual felon and also be placed in a higher presumptive range because of his prior record level, when the increased presumptive range is based upon the same convictions which make him an habitual felon.

Although we agree that the offenses of habitual driving on 26 May 1993 and 8 September 1994, which were used to establish defendant's status as an habitual felon, were elements of the habitual impaired driving conviction for which defendant was sentenced, *see* N.C.G.S. § 20-138.5 (Supp. 1995), the legislature has not prohibited the use of these offenses in establishing a defendant's status as an habitual felon. N.C.G.S. § 14-7.1 (1993). In this case, defendant was convicted of habitual impaired driving, which is a Class G felony. N.C.G.S. § 20-138.5. Defendant was then adjudicated an habitual felon, to be sentenced as a Class C felon. N.C.G.S. § 14-7.6. Only at this point, at sentencing, does the legislative prohibition in section 14-7.6 apply. Defendant has not argued and indeed, the record does not show, that his prior record level was established by using convictions necessary to adjudge him an habitual felon. Thus, there was no violation of the legislative prohibition in section 14-7.6 as defendant argues.

Affirmed.

Judges MARTIN, John C., and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 JULY 1996

ARRINGTON v. PERDUE FARMS No. 95-793	Ind. Comm. (029707)	Affirmed
BERTIE CITIZENS v. N.C. DEPT. OF E.H.N.R. No. 95-974	Wake (94CVS4237)	Affirmed
BIGGINS v. BLOUNT No. 95-854	Polk (94CVS21)	Affirmed
BLIZZARD v. HICKORY VINYL CORP. No. 95-1374	Caldwell (95CVS541)	Affirmed
BOOTH v. BOOTH No. 95-1172	Iredell (94CVD2108)	Affirmed
BOYD v. PREVETTE No. 95-1096	Wilkes (95CVD430)	Affirmed
BROWN v. ROBINSON No. 95-884	Jackson (93CVS144) (93CVS145) (93CVS146) (93CVS147) (93CVS148) (93CVS149)	Reversed
BURTON v. SOUTHERN ICE CO. No. 95-1165	Ind. Comm. (129698)	No Error
CARRERA ASSOC. v. STERN No. 95-858	Guilford (94CVD4210)	Dismissed
CARTER v. AETNA CASUALTY & SURETY CO. No. 95-976	Mecklenburg (94CVS9215)	Affirmed
CREASMAN v. N.C. BD. OF PHARMACY No. 95-826	Wilkes (93CVS1305)	Reversed
DANA v. KASS No. 95-1033	Alamance (94CVS567)	Affirmed

DAVIS v. DAVIS No. 95-1039	Guilford (92CVD8933)	Equitable Distribution: Affirmed. Alimony and Child Support: Reversed and Remanded. Attorney Fees: Reversed and Remanded.
HARGRAVE v. TESH No. 95-1201	Davidson (93CVS1988)	Affirmed
HARTSOE v. CONCORD No. 95-1162	Cabarrus 94CVS339)	Affirmed
IN RE ROSSER No. 95-797	Brunswick (92J94) (92J95)	Vacated and Remanded
IN RE SOUTH No. 95-1299	Watauga (95E29)	Affirmed
IN RE STORY No. 95-679	Davidson (94J130) (94J131)	Affirmed
J. I. CASE CREDIT CORP. v. YORK No. 95-921	Cleveland (93CVD2146)	Affirmed in Part; Reversed in Part, and Remanded
MacKENZIE v. COLOMBO No. 95-897	Pitt (93CVS226)	No Error
MANNING v. PACKAGING CORP. No. 95-1126	Rowan (95CVS264)	Affirmed
MAYFIELD v. BEVERLY ENTERPRISES No. 95-1042	Ind. Comm. (357717)	Affirmed
MAYO v. N.C. STATE HEARING AID DEALERS BD. No. 95-1123	Carteret (94CVS309)	Vacated and Remanded
McCANDIES v. McCANDIES No. 95-628	Orange (94CVD1533)	Reversed
MOORING v. KAWASAKI MOTORS CORP. No. 95-595	Greene (92CVS98)	Affirmed
NEESE v. McGARITY No. 95-259	Guilford (93CVS4824)	Affirmed and Remanded

NIX v. ESAU No. 95-947	Durham (86CVD3211)	Affirmed
PHILLIPS v. PHILLIPS No. 95-907	New Hanover (93CVD2181)	Affirmed in Part, Reversed in Part
RILEY v. ANDCO INDUSTRIES No. 95-802	Ind. Comm. (751019)	Affirmed
SEUFERT v. SEVEN LAKES DEVELOPMENT CO. No. 95-929	Moore (93CVS1002)	Affirmed
STATE v. ALLEN No. 95-1144	Buncombe (94CRS364) (94CRS68278) (94CRS80) (94CRS81) (94CRS68283) (94CRS68284)	No Error
STATE v. ALLISON No. 95-1150	Mecklenburg (95CRS77719)	No Error
STATE v. BLEVINS No. 96-9	Randolph (93-CRS-104) (93-CRS-105) (93-CRS-106)	No Error
STATE v. BRINSON No. 96-49	Hertford (95-CRS-882)	No Error
STATE v. BRYANT No. 95-927	Robeson (93CRS23277)	No Error
STATE v. BUSH No. 95-1228	Davidson (94CRS10436) (94CRS10437)	No Error
STATE v. CHERRY No. 95-1196	Bertie (93CRS2524) (93CRS2525) (93CRS2526)	No Error
STATE v. DORSEY No. 95-1214	Lincoln (93CRS1226) (93CRS1683)	No Error
STATE v. HAMMONDS No. 95-977	Robeson (93CRS22319)	No Error
STATE v. KEATON No. 95-517	New Hanover (93CRS11144) (93CRS11145)	Reversed

STATE v. LANE No. 95-1158	New Hanover (95CRS25085) (95CRS25086)	No Error
STATE v. MASH No. 95-958	Wilkes (93CRS6017)	Felonious larceny— No Error First degree burglary— Vacate judgment, remand for entry of judgment of guilty of second degree burglary and sentencing hearing on second degree burglary.
STATE v. MOODY No. 95-1237	Northampton (94CRS2568) (95CRS62)	No Error
STATE v. SIMONSON No. 95-799	Cumberland (92CRS24468)	No Error
STATE v. SMITH No. 95-1074	Forsyth (95CRS3368)	Affirmed
STATE v. SMITH No. 95-991	Wayne (94CRS11639)	No Error
STATE v. STEPTER No. 95-1167	Gaston (95CRS2592)	No Error
STATE v. THORPE No. 95-1250	Granville (94CRS3697) (94CRS3699)	No Error
STATE v. TINNIN No. 95-1173	Alamance (95CRS190)	No Error
STATE v. WESLEY No. 95-1139	Forsyth (95CRS16535)	No Error
WATERS v. C & J BROADCASTING No. 95-1439	Johnston (94CVS1937)	Affirmed
YOUNG v. MASTROM No. 95-532	Moore (85CVS006) (84CVS946) (85CVS117) (95CRS62)	Dismissed

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

(123 N.C. App. 163 (1996))

N.C. STEEL, INC.; N.C. STEEL ERECTORS, INC.; N.C. STEEL MANAGEMENT, INC.; N.C. STEEL FABRICATORS, INC., AIRCRAFT SERVICES OF RALEIGH, INC.; MONTAGUE BUILDING COMPANY; SMITH & SMITH, SURVEYORS, P.A., AND NORTH CAROLINA MARBLE & GRANITE, PLAINTIFFS, v. NATIONAL COUNCIL ON COMPENSATION INSURANCE; NATIONAL WORKER'S COMPENSATION REINSURANCE POOL; NORTH CAROLINA RATE BUREAU; AETNA CASUALTY & SURETY COMPANY; CIGNA INSURANCE COMPANY AND INS. CO. OF NORTH AMERICA; EMPLOYERS INS. OF WAUSAU A MUTUAL COMPANY; FIDELITY & CASUALTY CO. OF N.Y.; HARTFORD UNDERWRITERS INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; MICHIGAN MUTUAL INSURANCE COMPANY; NATIONAL SURETY CORPORATION; ST. PAUL FIRE & MARINE INSURANCE COMPANY; THE TRAVELERS INSURANCE COMPANY; AND UNITED STATES FIDELITY AND GUARANTY COMPANY, DEFENDANTS

No. COA95-380

(Filed 16 July 1996)

1. Pleadings § 117 (NCI4th)— 12(b)(6) motion—affidavits considered—summary judgment despite parties' stipulation

Although the parties purported to stipulate at the hearing below that the trial court could decide the case pursuant to N.C.G.S. § 1A-1, Rule 12, the trial court explicitly acknowledged that it considered affidavits submitted by plaintiffs and the court's memorandum and order aptly demonstrated that it relied heavily on plaintiffs' affidavits. As a result, the case is on appeal pursuant to a grant of summary judgment.

Am Jur 2d, Pleading § 230; Summary Judgment § 13.

What, other than affidavits, constitutes "matters outside the pleadings," which may convert motion under Federal Rule of Civil Procedure 12(b), (c), into motion for summary judgment. 2 ALR Fed. 1027.

2. Unfair Competition or Trade Practices § 33 (NCI4th)—filed rate doctrine—adopted in unfair competition actions

The filed rate doctrine is recognized and adopted in the context of a suit under N.C.G.S. § 75-1 in an action in which corporations which are or were required to provide workers' compensation insurance alleged that defendants (workers' comp insurers and incorporated insurance rating organizations) undertook actions which violated N.C.G.S. § 75-1 and resulted in higher workers' compensation premiums and other damages. The filed

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

rate doctrine holds that a plaintiff may not claim damages on the grounds that a rate filed with and approved by a regulator as reasonable was nonetheless excessive or inadequate because it was the product of an anticompetitive conspiracy or other unlawful conduct by defendants. N.C.G.S. § 58-2-75.

Am Jur 2d, Consumer and Borrower Protection § 302; Monopolies § 299.

3. Insurance § 8 (NCI4th)— workers' compensation rates— filed rate doctrine—claim for illegally fixed rates

The trial court did not err in dismissing a claim for relief that workers' compensation insurers and their rate bureau had illegally fixed rates because that claim would require a jury to recalculate rates, which would violate the filed rate doctrine.

Am Jur 2d, Consumer and Borrower Protection § 302; Monopolies § 299.

4. Insurance § 8 (NCI4th)— workers' compensation—illegal agreement increasing residual market—filed rate doctrine—claim not excluded

The filed rate doctrine does not preclude recovery on a claim that an illegal agreement between the defendants set an artificially high serving fee to workers' compensation carriers which forced employers into the residual market where they must pay surcharges and lose opportunities for discounts and dividends. The filed rate doctrine does not act to bar any claims which involve damages other than inflated rates; this claim does not require approved rates to be calculated. There is no authority for dismissing a state antitrust claim based on the filed rate doctrine when damages are not calculated by measuring the difference between the filed rates and rates which would have been approved but for illegal conduct.

Am Jur 2d, Consumer and Borrower Protection § 302; Monopolies § 299.

Appeal by plaintiffs-appellants from Memorandum and Order entered 14 February 1995 by Judge Giles R. Clark in Wake County Superior Court. Heard in the Court of Appeals 24 January 1996.

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

Lore & McClearen, by R. James Lore & R. Edwin McClearen, & Siegel, Brill, Greupner & Duffy, P.A., by Wood R. Foster, Jr., Wm. Christopher Penwell, and Jordan M. Lewis, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr., for defendant-appellee Aetna Casualty & Surety Company.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen, for defendants-appellees National Council on Compensation Insurance and National Workers' Compensation Reinsurance Pool.

Young, Moore and Henderson by R. Michael Strickland for defendant-appellee North Carolina Rate Bureau.

Poyner & Spruill, by John R. Jolly, Jr., for defendants-appellees Cigna Insurance Company, and Insurance Company of North America.

Ragsdale, Liggett & Foley, by George R. Ragsdale, for defendant-appellee Employers Insurance of Wausau.

Cranfill, Sumner & Hartzog, by Dan M. Hartzog, for defendant-appellee Fidelity & Casualty Company, of New York.

Moore & Van Allen, by Joseph W. Eason, for defendant-appellee Hartford Underwriters Insurance Company.

Manning, Fulton & Skinner, by John B. McMillan, for defendant-appellee Liberty Mutual Insurance Company.

Moore & Van Allen, by Joseph W. Eason, for defendant-appellant Michigan Mutual Insurance Company.

Maupin, Taylor, Ellis & Adams, by M. Keith Kapp, for defendant-appellee National Surety Corporation.

Petree Stockton, L.L.P., by John L. Sarratt, for defendant-appellee St. Paul Fire & Marine Insurance Company.

Parker, Poe, Adams & Bernstein, by John F. Graybeal, for defendant-appellee Travelers Insurance Company.

Tharington, Smith & Hargrove, by Douglas E. Kingsbery, for defendant-appellee United States Fidelity & Guaranty Company.

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

WYNN, Judge.

The record, taken in the light most favorable to plaintiffs, tends to show the following: Plaintiffs in this action are North Carolina corporations which are either currently required to provide workers' compensation insurance pursuant to Chapter 97 of the North Carolina General Statutes, or were formerly required to do so. Defendants are workers' compensation insurers, except for National Council on Compensation Insurance (hereinafter NCCI) and North Carolina Rate Bureau (hereinafter NCRB) which are incorporated insurance rating organizations. Plaintiffs allege that defendants, along with others not named in this lawsuit, undertook actions which violated N.C. Gen. Stat. § 75-1 *et seq.* (1994), and that these illegal actions resulted in higher workers' compensation premiums, and other damages to the plaintiffs. Defendants contend that plaintiffs cannot maintain this action in light of a doctrine known as the "filed rate doctrine".

N.C. Gen. Stat. §§ 97-9, 97-93 (1991 & Supp. 1995) require that all employers, with certain exceptions not relevant to this opinion, secure workers' compensation insurance for their employees. Employers may satisfy this statutory requirement through self-insurance if the employer meets the statutory requirements to self-insure. Employers which are required to insure workers under Chapter 97 and are not qualified to self-insure, or choose not to self-insure, must purchase insurance from a private company.

There are two "markets" in which a purchaser of workers' compensation insurance may purchase that insurance: The voluntary market, and the residual market. Employers which desire workers' compensation insurance first attempt to secure coverage in the voluntary market from a private insurance company. Employers which cannot find an insurance company to accept them in the voluntary market must purchase insurance in the residual market, which is often referred to as the assigned risk pool.

It is more advantageous for an employer to purchase insurance in the voluntary market than the residual market for three principal reasons: (1) There is a surcharge in the residual market. Residual market premiums are calculated in a similar manner as in the voluntary market, and the resulting premium amount is multiplied by a surcharge to reflect the increased risks presented by employers in the residual market; (2) dividends are often paid on policies in the voluntary market, but not on policies in the residual market; and (3) discounts

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

sometimes available in the voluntary market are not available in the residual market.

In North Carolina, workers' compensation insurance rates are regulated by the Department of Insurance, created by N.C. Gen. Stat. § 58-2-1 (1994). That department executes the laws relating to insurance as prescribed by the General Assembly. The Commissioner of Insurance of North Carolina (hereinafter Commissioner) is an elected official who serves as the chief officer of the Department of Insurance.

When insurers request rate increases, the NCRB and the NCCI begin the process by filing a formal rate increase request with the Commissioner. In filing such a request, the NCRB attempts to estimate the amount of premium income needed to cover total projected expenses in the coming year. Included in this total are administrative expenses, and claims. From the total expenses projected, NCRB subtracts investment income, and builds in a reasonable profit.

Upon filing a request to increase rates, NCRB must submit detailed statistical information, including but not limited to investment earnings, overhead expenses, trends in insurance costs and other information requested by the Commissioner. From the information available, the Commissioner determines the workers' compensation rates for each of nearly six hundred different job classifications. By statute, rates must not be excessive, inadequate or unfairly discriminatory. N.C.G.S. § 58-36-10.

This regulatory scheme is intended to displace price competition; insurers are forbidden from issuing a policy at a rate other than that approved by the Commissioner for the relevant job classification unless a deviation has been approved by the Commissioner.

Under the North Carolina Workers Compensation Insurance Plan (hereinafter the Plan), the Commissioner delegates management of the residual workers' compensation market to NCRB. Each insurer must file written authority with NCRB permitting NCRB to assign risks to the insurer which cannot be placed in the voluntary market. NCRB has apparently delegated management of the Plan to defendant National Worker's Compensation Reinsurance Pool (hereinafter National Pool).

The National Pool, consisting of all insurance companies which write workers' compensation insurance in North Carolina, was created by defendant NCCI, and is managed by NCCI. NCCI assigns

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

each employer a servicing carrier from among the eleven companies chosen by the National Pool to service the North Carolina residual market. Servicing carriers are responsible for issuing policies, collecting premiums, conducting payroll audits, providing inspections, supervising safety programs and processing claims. Servicing carriers are not responsible, however, for paying claims; rather, the National Pool ultimately pays the claims. Employers in the residual market in effect purchase reinsurance from the National Pool in order to pay on claims in the residual market.

According to plaintiffs' complaint, the servicing carriers are paid a fee which is determined by agreement between the National Pool and the eleven servicing carriers selected by the National Pool through NCCI to service the residual market in North Carolina. Each of the servicing carriers is paid its portion of the servicing carrier fee based upon the percentage of the total premium in the residual market which it collected. The eleven defendant insurance companies in the instant case have been servicing carriers during all or some of the time since 1989.

Plaintiffs' complaint alleges that the agreement between the National Pool and the eleven defendant servicing carriers, which provides that each servicing carrier is paid the same amount as a servicing carrier fee, violates N.C.G.S. § 58-63-15, and thus violates N.C.G.S. § 75-1 *et seq.* Plaintiffs cite to case law which states that any violation of N.C.G.S. § 58-63-15 constitutes a per se violation of N.C.G.S. § 75-1.1 *et seq.* See, e.g., *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986).

Plaintiffs contend that defendants' failure to disclose information regarding their agreement to fix the servicing carrier fee misled the Commissioner because little attention was focused by the Commissioner on the amount listed as expenses in the filings submitted by defendants. Plaintiffs contend that since expenses were artificially high due to the agreement, the Commissioner approved higher rates in both the voluntary and residual markets than he would have approved "in a competitive residual market."

Plaintiffs set forth two separate claims for relief. In the first claim, plaintiffs allege that they have been damaged by defendants' alleged fixing of the servicing carrier fee because defendants submitted expenses which were inflated due to the conspiracy. Since expenses were inflated, the amount of premium income necessary to pay those expenses, as well as projected claims, was higher than it

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

would have been had the residual market been a competitive one. Thus, premium rates were higher than they would have been absent the conspiracy.

In their second claim for relief, plaintiffs contend that defendants' fixing of the servicing carrier fee increased the size of the residual market beyond what it would have been. Put another way, the scheme resulted in employers being placed in the residual market which would otherwise have been able to secure insurance in the voluntary market. These employers are damaged due to the loss of possible discounts and dividends, as well as the imposition of a surcharge. Plaintiffs also included in their complaint a request for injunctive relief.

Defendants moved to dismiss plaintiffs' action, alleging that the "filed rate doctrine" barred plaintiffs' claims. In a memorandum and order filed 16 February 1995, Superior Court Judge Giles R. Clark granted defendants' motion to dismiss. From this decision, plaintiffs appeal, and assign error to the dismissal of their two damage claims. Plaintiffs have not assigned error to the dismissal of their request for injunctive relief, thus the trial court's dismissal of plaintiffs' request for an injunction is not before this Court.

[1] As an initial matter, we must determine under which of the North Carolina Rules of Civil Procedure this case is before us. At the hearing below, the parties purported to stipulate that the trial court could decide the case pursuant to N.C. Gen. Stat. § 1A-1, Rule 12 (1990).

However, in dismissing plaintiffs' action under Rule 12, the trial court explicitly acknowledged that it considered affidavits submitted by plaintiffs. In addition, the trial court's memorandum and order aptly demonstrated that it relied heavily on plaintiffs' affidavits.

When a trial court considers matters outside the pleadings, a motion under Rule 12 is automatically converted into a motion for summary judgment. *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

As a result, the case *sub judice* is before this Court pursuant to a grant of summary judgment to defendants on all counts of plaintiffs' claim.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c). The trial court must view the forecast of evidence in the light most favorable to the non-moving party. *Craven County Bd. of Education v. Boyles*, 343 N.C. 87, 90, 468 S.E.2d 50, 52 (1996). If summary judgment is granted at trial, the decision should be affirmed if there is any ground to support the decision. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

The issues on appeal are: (I) Whether North Carolina should recognize and adopt the “filed rate doctrine”; (II) if so, whether that doctrine bars plaintiffs’ first claim that defendants illegally fixed the service carrier fees; and (III) if so, whether that doctrine bars plaintiffs’ second claim that defendants’ fixing of the service carrier fee has increased the size of the market beyond what it should have been. We adopt the “filed rate doctrine” for application in North Carolina and conclude that the doctrine bars plaintiffs’ first claim, but not their second claim.

I.

[2] Defendants contend on appeal that this Court should recognize and adopt the judicially established “filed rate doctrine” in the context of a lawsuit under N.C.G.S. § 75-1 *et seq.* We agree.

The filed rate doctrine, otherwise known as the Keogh doctrine, was first applied to an antitrust claim by the United States Supreme Court in *Keogh v. Chicago & N.W. R. Co.*, 260 U.S. 156, 67 L. Ed. 183 (1922). The doctrine holds that a plaintiff may not claim damages “based on the grounds that a rate filed with and approved by a regulator as reasonable was nonetheless excessive or inadequate because it was the product of an anticompetitive conspiracy or other unlawful conduct by defendants.” *Uniforce Temp. Personnel v. National Council*, 892 F. Supp 1503, 1512 (S.D. Fla. 1995).

In *Keogh*, a manufacturer complained that defendant-shippers illegally agreed to fix rates filed with the Interstate Commerce Commission in violation of the Sherman Antitrust Act, 15 U.S.C.A. § 1. *Keogh*, 260 U.S. at 159-60, 67 L. Ed. at 185-86. The Supreme Court concluded that upon approval of shipping rates by the Interstate Commerce Commission, the rates were established to be lawful and the shipper had no cause of action under the Sherman Antitrust Act. *Id.* at 162-63, 67 L. Ed. at 186-87; *See also Square D Co. v. Niagara Frontier Tariff Bur.*, 476 U.S. 409, 90 L. Ed. 2d 413 (1986). In short,

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

the Supreme Court held that the filed rate doctrine precludes a plaintiff from stating a cause of action when there is a violation of federal antitrust laws in connection with any rate approved by federal regulators. *Id.* at 422, 90 L. Ed. 2d at 425. Instead, the rate is deemed to be lawful, and cannot be challenged.

Our Supreme Court has held that federal precedent is instructive in interpreting Chapter 75 due to the similarity between provisions of Chapter 75 and the federal antitrust laws. *See, e.g., Madison Cablevision v. City of Morganton*, 325 N.C. 634, 656-58, 386 S.E.2d 200, 213-14 (1989); *Johnson v. Insurance Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980), *rev'd on other grounds*, *Myers & Chapman Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989); *Rose v. Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973). In addition, the filed rate doctrine has been applied to causes of action arising from rates approved by state regulators. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 488, *cert. denied*, 504 U.S. 957, 119 L. Ed. 2d 228 (8th Cir. 1992); *In re Empire Blue Cross & Blue Shield Cust. Lit. v. Weissman*, 622 N.Y.S.2d 843 (N.Y. Sup. Ct. 1994) *aff'd sub nom. Minihane v. Weissman*, 640 N.Y.S.2d 102 (N.Y. App. Div. 1996); *Prentice v. Title Ins. Co. of Minnesota*, 500 N.W.2d 658, *reh'g denied*, 508 N.W.2d 425 (Wis. 1993), *cert. denied*, — U.S. — 127 L. Ed. 2d 378 (1994). As a result, we consider precedent from both federal and state courts insofar as it may assist us in construing Chapter 58 and Chapter 75.

The courts which have adopted the filed rate doctrine have given several reasons for doing so. These reasons include: (1) That the agency's authority to determine the reasonableness of rates must be preserved. *H.J.*, 954 F.2d at 488; *see also Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d. Cir. 1994) (holding that the filed rate doctrine is necessary because:

Congress and state legislatures establish regulatory agencies in part to ensure that rates charged by generally . . . oligopolistic industries are reasonable If courts were licensed to enter this process under the guise of ferreting out . . . [antitrust violations] in the rate-making process, they would unduly subvert the regulating agencies' authority and thereby undermine the stability of the system).

Id. at 20-21; (2) that the agency which regulates the industry involved possesses expertise with regard to that industry, whereas courts do

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

not. *Id.* at 21; (3) that allowing a recovery under the antitrust laws would undermine the regulatory scheme, since the statute allows for enforcement by the appropriate state officers. *Id.*; (4) that allowing a suit to proceed under the antitrust laws may result in different prices being paid by victorious plaintiffs than non-suing ratepayers, which violates the statutory scheme of uniform rates. *Id.* at 21-22; *Keogh*, 260 U.S. at 163-64, 67 L. Ed. at 188.

Another factor counseling us to adopt the filed rate doctrine is a desire to insure uniformity with federal antitrust law in order to avoid forum shopping. Since many actions violate both federal and state antitrust laws, *see Cellular Plus Inc. v. Superior Court*, 18 Cal. Rptr.2d 308 (Ca. Ct. App. 1993), and our Chapter 75 has been held by our Supreme Court to be similar to federal antitrust laws, absent compelling reasons to the contrary, we are not inclined to permit a remedy under state law that is not allowed under federal law.

In addition, Chapter 58 of the General Statutes, which regulates insurance in North Carolina, is a comprehensive regulatory scheme which includes remedies for the violations alleged by plaintiffs. N.C.G.S. § 58-2-70(b) states that whenever the Commissioner has reason to believe that any person (defined in N.C.G.S. § 58-1-5 as “an individual, aggregation of individuals, corporation, company, association and partnership”) has violated Article 63 of Chapter 58, (which is the article that plaintiffs in the instant case allege that defendants have violated), the Commissioner may hold a hearing to determine if that person has in fact violated Article 63. N.C.G.S. § 58-2-70(b). If the Commissioner finds that a violation of Article 63 has occurred, he or she may order payment of a penalty of up to one thousand dollars (\$1,000) for each day a violation has occurred. N.C.G.S. § 58-2-70(d).

Moreover, the Commissioner may apply to the Superior Court of Wake County for an order directing payment of restitution in an amount that would make whole any person harmed by the violation. N.C.G.S. § 58-2-70(c), (e). The Commissioner is also given the power to negotiate an acceptable agreement with any violator. N.C.G.S. § 58-2-70(g).

The above cited sections illustrate that by enacting N.C.G.S. § 58-2-70, the legislature granted the Commissioner the power to ensure that the various provisions of Chapter 58 were followed, and the ability to institute proceedings to recover any money lost by the victims of statutory violations. Agency enforcement of the provisions

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

of Chapter 58 is a choice made by the legislature. Such a scheme is logical because:

Individual ratepayers are unlikely to have any special knowledge of the alleged wrongdoing that would make it advantageous to have private enforcement through the . . . antitrust [laws]. By contrast, regulators who are intimately familiar with the industry are best situated to discover when regulated entities engage in [violations of the state antitrust laws].

Wegoland, 27 F.3d at 21.

Finally, N.C.G.S. § 58-2-75(a) provides for judicial review of any decision or order of the Commissioner, with exceptions not relevant here. An aggrieved person must file for review within thirty days, or else “the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court . . . to enforce or restrain the enforcement of the same.” *Id.* In this case, the “merits” are the rates set by the Commissioner.

N.C.G.S. § 58-2-75, in effect, is a thirty day statute of limitations on challenging an order or decision of the Commissioner. After thirty days have passed, the decision is final. Failing to apply the filed rate doctrine would essentially circumvent this time limit in that plaintiffs would be granted the opportunity for a jury to review the rates set by the Commissioner and to substitute its judgment regarding the rates the Commissioner would have approved absent the illegal conduct. We note further that application of the filed rate doctrine serves to follow the command set by the legislature that following the thirty days “there shall be no trial of the merits thereof.”

Plaintiffs argue that N.C.G.S. § 58-63-35 represents a “non-exclusivity” clause, which precludes application of the filed rate doctrine. Plaintiffs cite *Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225 (1995) for the proposition that such a non-exclusivity clause bars application of the filed rate doctrine.

In *Stanley*, our Supreme Court held that the non-exclusivity clause found in the Ejectment of Residential Tenants Act allowed the plaintiffs to sue their landlord under Chapter 75 if the landlord violated N.C.G.S. § 75-1 *et seq.*, despite the fact that the Ejectment of Residential Tenants Act provided its own remedies, which did not include treble damages. *Id.* at 722, 454 S.E.2d at 228. Plaintiffs con-

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

tend that the non-exclusivity clause found in N.C.G.S. § 58-63-35 operates in a similar fashion. We disagree.

The non-exclusivity clause referenced in *Stanley* states that “[t]he remedies created by this section are supplementary to all existing common-law and statutory rights and remedies.” *Id.* at 722, 454 S.E.2d at 227-28. In contrast, the non-exclusivity clause in N.C.G.S. § 58-63-35(d) provides: “No order of the Commissioner under this Article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State.”

While the non-exclusivity clause in the Ejectment of Residential Tenants Act unambiguously states that the remedies provided therein are in addition to remedies provided by common law and statute, the non-exclusivity clause in N.C.G.S. § 58-63-35 states only that orders of the Commissioner, or court orders enforcing a Commissioner's order, do not absolve a person affected by either order from compliance with other state laws. Thus, the non-exclusivity clause in the instant case is readily distinguishable from the non-exclusivity clause in *Stanley*.

In addition, N.C.G.S. § 58-2-75 deals specifically with the right to judicial review of a decision of the Commissioner. By contrast, N.C.G.S. § 58-63-35 deals generally with the fact that a Commissioner's order does not negate the necessity to comply with other state laws. “[W]here one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary.” *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992), *reh'g denied*, 333 N.C. 349, 426 S.E.2d 708 (1993).

Plaintiffs further contend that this Court rejected the filed rate doctrine in *Phillips v. Integon Corp.*, 70 N.C. App. 440, 319 S.E.2d 673 (1984). In *Phillips*, the plaintiff, an agent selling insurance for the defendant, sued under Chapter 75 alleging that the defendant violated their agreement by competing with him to the detriment of his business. The defendant contended that Chapter 58 exclusively regulated insurance companies, and that a suit under Chapter 75 could not proceed for a violation of Chapter 58. *Id.* at 441-43, 319 S.E.2d at 674-75. This Court disagreed and held that Chapter 58 remedies apply when

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

an insurance company violates Chapter 58. *Id.* at 443, 319 S.E.2d at 675.

The Chapter 58 violations in *Phillips* occurred in the context of a suit for violation of an agency agreement. The *Phillips* Court did not consider rates filed pursuant to Chapter 58. In contrast, the Chapter 75 violations in the instant case occurred in the context of a rate filing. As the *Phillips* Court pointed out, there was little conflict between Chapter 75, and N.C.G.S. § 58-36-30 (formerly N.C.G.S. § 58-124.23). However, we perceive a direct conflict between Chapter 75 and the role of the Commissioner in Chapter 58, in which the Commissioner is empowered, within statutory guidelines, to approve or disapprove insurance rates. If a jury is allowed to recalculate insurance rates based on Chapter 75 violations, the Commissioner's role, as set forth by the legislature, would be subverted.

Plaintiffs further contend that applying the filed rate doctrine in the instant case will effectively grant defendants immunity from our antitrust laws. We disagree. As the United States Supreme Court stated in *Square D*, 476 U.S. 409, 90 L. Ed. 2d 413:

[W]e disagree, however, with [plaintiffs'] view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy for [a person] claiming that a rate submitted to, and approved by, [the ratemaking authorities] was the product of a antitrust violation.

Id. at 422, 90 L. Ed. 2d at 425. *See also Wegoland*, 27 F.3d at 22 (holding that "the filed rate doctrine does not leave regulated industries immune from suit under the . . . antitrust statutes. While individual ratepayers are precluded from challenging the reasonableness of the rates, the proper government officials remain free to pursue this avenue in appropriate circumstances.").

In sum, we conclude that the filed rate doctrine applies in North Carolina in the context of a suit under N.C.G.S. § 75-1 *et seq.*

II.

[3] Having determined that the filed rate doctrine applies in North Carolina, we must next determine whether it bars plaintiffs from

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

asserting their claim for relief that “[insurance] rates are forced upwards by the introduction of undisclosed non-competitive expense and loss factors that would be demonstrably lower in a competitive residual market.”

Plaintiffs concede that the measure of damages under this theory would be measured by *the difference between the rates as approved by the Commissioner, and the rates which would have been approved but for the illegal conduct of defendants*. In short, as defendants contend, plaintiffs would request that the jury recalculate the rates that the Commissioner would have approved but for the illegal acts of the defendants. It is precisely this calculation which the filed rate doctrine forbids. *See, e.g., H.J.*, 954 F.2d at 488 (stating that the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue.”); *Cullum v. Seagull Mid-South, Inc.*, 907 S.W.2d 741, 744 (Ark. 1995) (same); *Uniforce*, 892 F.Supp at 1512 (stating that “[the filed rate doctrine] precludes a plaintiff from asserting an antitrust claim for damages based on the grounds that a rate filed with and approved by a regulator as reasonable was nonetheless excessive . . . because it was the product of an anticompetitive conspiracy or other unlawful conduct by defendants.”).

Since we have determined that the filed rate doctrine should be applied to this case, and that plaintiffs’ first claim for relief would require a jury to recalculate rates, which the filed rate doctrine forbids, we hold that the trial court did not err in dismissing plaintiffs’ first claim for relief.

III.

[4] Plaintiffs next contend that the filed rate doctrine does not bar their second claim for relief. Their second theory of damages, with all facts assumed to be true, is as follows: An illegal agreement between and among defendants set an artificially high servicing fee to the carriers which service the residual market. This fee is called the servicing carrier fee. The residual market carriers are reinsured by the National Pool, and do not pay out claims in the residual market. Instead, these claims are paid by the National Pool. The money paid by purchasers of insurance in the residual market (residual market premium) must cover both the excessive servicing carrier fee, and claims in the residual market. Due to the excessive servicing carrier fee, the residual market premium is insufficient to cover claims in the

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

{123 N.C. App. 163 (1996)}

residual market (residual market losses). This shortfall is called the residual market burden. All individual companies which are members of the National Pool agree to pay a percentage of the residual market burden based on their share of the North Carolina voluntary insurance market.

Because companies which are members of the National Pool are also sellers of insurance in the voluntary market, their contributions to the residual market burden result in their having less money available to pay losses (claims) in the voluntary market. Since there is less money available to pay claims in the voluntary market, insurers become more selective in underwriting policies in the voluntary market. Thus, more employers are forced to purchase insurance in the residual market. These employers suffer damages by being forced into the residual market, in that they must pay surcharges and they lose opportunities for discounts and dividends.

Defendants contend that the filed rate doctrine precludes recovery on plaintiffs' second claim for relief. We disagree.

As stated earlier, the filed rate doctrine forbids a recovery where the measure of damages is the difference between the rate approved by the regulatory body and the rate which would have been approved absent the illegal conduct. *Cullum*, 907 S.W.2d at 744. However, the filed rate doctrine does not act to bar any claims which involve damages other than inflated rates. *See, e.g., H.J.*, 954 F.2d at 488.

Defendants cite *Uniforce*, 892 F.Supp. 1503 and *Calico Trailer Mfg. Co., Inc. v. Insurance Co. of North America*, 1994 WL 823554 (E.D. Ark. 1994) in support of their contention that plaintiffs' second claim for relief is also barred by the filed rate doctrine. These cases are easily distinguishable. In *Uniforce*, the Court stated:

In order for this Court or a jury to award damages, it would be necessary to measure the difference between the properly approved workers' compensation insurance rates paid by plaintiffs and those mythical rates which would have been applicable but for the defendants' concerted activity. This undertaking is not within the province of the courts

892 F. Supp. at 1512. Although, as defendants point out, the *Uniforce* Court dismissed claims similar to those raised by plaintiffs' second claim for relief, it did so on federal antitrust grounds not applicable to the instant case. In addition, the *Uniforce* Court apparently thought that it was necessary to calculate rates which would have

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

[123 N.C. App. 163 (1996)]

been approved in order to award damages. We do not believe that plaintiffs' second claim for relief requires approved rates to be calculated. Instead, we find that plaintiffs' second claim for relief depends only on the number of employers who were forced to purchase insurance in the residual market by the alleged illegal conduct which would otherwise have been able to purchase insurance in the voluntary market.

In *Calico*, the Court held that the essence of plaintiff's complaint involved a challenge to approved rates. The Court dismissed plaintiff's federal antitrust claims on several grounds, including the filed rate doctrine, and declined to exercise jurisdiction over plaintiff's state-law claims. *Calico*, 1994 WL 823554.

Thus, defendants have cited no authority and we have found none for dismissing a state antitrust claim based on the filed rate doctrine when damages are not calculated by measuring the difference between the filed rates and rates which would have been approved but for illegal conduct. We decline defendants' invitation to expand the filed rate doctrine to cover such claims.

We believe that our holding strikes the appropriate balance between upholding the regulatory scheme and the power of the Commissioner on the one hand, and protecting the citizens and businesses of North Carolina from illegal conduct on the other.

The decision of the court below is affirmed in part and reversed in part, and this case is remanded to the trial court for proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part.

Judges GREENE and McGEE concur.

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

STATE OF NORTH CAROLINA v. FRANKLIN BALLENGER

No. COA95-847

(Filed 16 July 1996)

**Narcotics, Controlled Substances, and Paraphernalia § 207
(NC14th)— possession of two pounds of marijuana—tax
assessment—not double jeopardy**

The trial court erred by dismissing charges arising from possession of two pounds of marijuana on double jeopardy grounds where defendant had paid a tax assessment under the North Carolina Controlled Substance Act. N.C.G.S. § 105-113.105 *et seq.*, as it was in effect at all times pertinent to this case, contains neither of the “unusual features” upon which the United States Supreme Court relied in *Montana Dept. of Rev. v. Kurth Ranch*, 128 L.Ed. 767, in concluding that the Montana statute violated double jeopardy in that the North Carolina tax is not predicated upon whether the taxpayer has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed. The North Carolina statute is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation and does not have such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause.

Am Jur 2d, Drugs and Controlled Substances § 192.

Judge SMITH dissenting.

Appeal by the State from order entered 5 May 1995 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 15 April 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Christopher E. Allen, for the State.

James H. Price, III, and Charles L. Morgan, Jr., for defendant-appellee.

MARTIN, John C., Judge.

The State of North Carolina appeals from an order of the trial court dismissing criminal charges against defendant, Franklin

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

Ballenger, for violation of the North Carolina Controlled Substances Act, G.S. § 90-86 *et seq.* (1993). The facts of this case are undisputed and are as follows: On 15 September 1994, defendant was found in possession of two pounds of marijuana in Guilford County, North Carolina. He was arrested and charged with felonious possession of marijuana, and possession with intent to sell or deliver marijuana, in violation of G.S. § 90-95(a). Pursuant to G.S. § 105-113.105 *et seq.* (1992), the North Carolina Controlled Substance Tax, the North Carolina Department of Revenue issued a controlled substance tax assessment against defendant.

Defendant paid the tax assessment in the full amount of \$3,837.24, including tax, interest, and penalty, on 19 April 1995. Defendant moved to dismiss the criminal charges for possession of the controlled substances, alleging that his criminal prosecution would violate the prohibition against successive punishments for the same offense contained in the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and guaranteed under the "law of the land" clause of Article I, § 19 of the North Carolina Constitution. The trial court granted defendant's motion, and the State appeals pursuant to G.S. § 15A-1445(a)(1).

"The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense" *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted). The "law of the land" clause incorporates similar protections under the North Carolina Constitution. *See* N.C. Const. art. I, § 19. In this case, the issue is whether the assessment and collection of the North Carolina Controlled Substance Tax pursuant to G.S. § 105-113.105 *et seq.*, constitutes punishment so as to bar the subsequent prosecution and punishment of defendant for criminal possession of the same drugs. For the following reasons, we conclude that it does not and we reverse the trial court's dismissal of the criminal charges.

The trial court expressly based its order upon the decision of the United States Supreme Court in *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. —, 128 L. Ed. 2d 767 (1994), a case in which the Court subjected Montana's tax statute imposing a tax on the possession and storage of dangerous drugs to double jeopardy analysis. The Supreme Court held that Montana's assessment of the tax on the possession of illegal drugs in a separate proceeding after the State had

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

imposed a criminal penalty arising from the same conduct amounted to “a second punishment within the contemplation of [the Double Jeopardy Clause]” *Kurth Ranch*, 511 U.S. at —, 128 L. Ed. 2d at 782 (citations omitted).

In *Kurth Ranch*, Montana law enforcement officials raided a farm operated by members of the Kurth family and found marijuana plants and other contraband, all of which was confiscated and presumably destroyed. In a state criminal proceeding, the Kurths pled guilty to state drug charges and were sentenced for the offenses. In a separate proceeding, the Montana Department of Revenue attempted to collect from the Kurths almost \$900,000.00 in taxes pursuant to the Montana Dangerous Drug Tax Act, Mont. Code Ann. § 15-25-111 *et seq.* (1987). The Dangerous Drug Tax Act imposed “a tax ‘on the possession and storage of dangerous drugs’”, and was “to be ‘collected only after any state or federal fines or forfeitures [had] been satisfied.’” *Kurth Ranch* 511 U.S. at —, 128 L. Ed. 2d at 773, (*quoting* Mont. Code Ann. §§ 15-25-111(1) and 15-25-111(3)). The tax was either ten percent of the assessed market value of the drugs as determined by the Montana Department of Revenue or a specified amount per ounce depending on the drug, (for example, \$100.00 per ounce for marijuana, and \$250.00 per ounce for hashish), whichever was greater. *Id.* The Montana statute also expressly provided for the Montana Department of Revenue to adopt rules to administer and enforce the tax. *Id.* Under rules adopted by that Department, the taxpayer was required to file a return within seventy-two hours of his or her arrest. *Id.* The taxpayer, however, had no obligation to file a return or to pay any tax unless and until the taxpayer was arrested. *Id.* at —, 128 L. Ed. 2d at 774.

The Kurths challenged the constitutionality of the Montana tax, and the lower courts invalidated the assessment as violative of the Double Jeopardy Clause. *Id.* at —, 128 L. Ed. 2d at 774-75. The United States Supreme Court affirmed, holding that the tax violated the constitutional prohibition against successive punishments for the same offense. *Id.* The Court’s analysis centered upon whether the Montana tax had “punitive characteristics that subject it to the constraints of the Double Jeopardy Clause.” *Id.* at —, 128 L. Ed. 2d at 778.

The Supreme Court noted “that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment,” although those attributes were “consistent with a punitive character.” *Id.* at —, 128 L. Ed. 2d at 779. The Montana tax was

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

found to be “remarkably high” - a significant part of the assessment was more than eight times the drug’s market value. *Id.* Moreover, the Court found the Montana legislature had clearly intended the tax to deter people from possessing marijuana. *Id.* However, the Court concentrated on two “unusual features” of the Montana statute which set it apart from most taxes and which the Court found pivotal in holding that the tax was punitive and therefore, violative of the Double Jeopardy Clause. *Id.* at —, 128 L. Ed. 2d at 779-81.

The first “unusual feature” which concerned the Court was that the so-called tax was conditioned upon the commission of a crime. The Court viewed this condition as “significant of penal and prohibitory intent rather than the gathering of revenue.” *Id.* at —, 128 L. Ed. 2d at 779-80. Further, the Court noted that it had relied on the absence of such a condition to uphold a federal marijuana tax on the grounds that that tax was a civil rather than criminal sanction because the tax was not contingent upon the taxpayer’s criminal conduct. *Id.* at —, 128 L. Ed. 2d at 780, (citing *U.S. v. Sanchez*, 340 U.S. 42, 95 L. Ed. 47 (1950)). Significantly, the Court stated that:

[i]n this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in this first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.

Id.

A second “unusual feature” of concern to the Court was the fact that, although the Montana statute characterized the tax imposed as a property tax, i.e., that is, a tax on the possession and storage of dangerous drugs, it was actually levied on goods the taxpayer neither owned nor possessed when imposed. *Id.* at —, 128 L. Ed. 2d at 780-81. Because the tax was not assessed until and unless a taxpayer was arrested, the drugs presumably were already destroyed or no longer possessed when the tax was imposed. *Id.* at —, 128 L. Ed. 2d at 781. The Court found this type of tax, “imposed on criminals and no others,” as departing “so far from normal revenue laws as to become a form of punishment.” *Id.* In summary, the Court concluded that “[t]aken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis.” *Id.*

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

The North Carolina Controlled Substance Tax, G.S. § 105-113.105 *et seq.*, as it was in effect at all times pertinent to this case, however, contains neither of the “unusual features” upon which the Supreme Court relied in *Kurth Ranch* to conclude that Montana’s dangerous drug tax constituted punishment for double jeopardy purposes. The North Carolina Controlled Substance Tax is not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed. Specifically, the North Carolina Controlled Substance Tax provides that a “tax is levied on controlled substances and counterfeit controlled substances possessed by dealers . . .” at various rates depending on the type of controlled substance possessed. N.C. Gen. Stat. § 105-113.107 (1992). A dealer is defined as:

[a] person who in violation of G.S. 90-95 possesses, delivers, sells, or manufactures more than 42.5 grams of marijuana, seven or more grams of any other controlled substance or counterfeit controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance or counterfeit controlled substance that is not sold by weight.

N.C. Gen. Stat. § 105-113.106 (1992 & 1994 Cum. Supp.). The tax is due within forty-eight hours after the dealer possesses the substance in this State upon which the tax has not been previously paid as evidenced by a tax stamp. N.C. Gen. Stat. § 105-113.109 (1992). The tax obligation is not contingent upon the dealer’s arrest which, in the normal course of events, would result in the confiscation and destruction of the substance. The dealer can satisfy his tax obligation by paying the tax upon acquisition of the substance and by then permanently affixing thereto stamps issued by the Secretary of Revenue to indicate payment. N.C. Gen. Stat. § 105-113.108 (1992). So long as the stamps remain affixed, no additional tax is thereafter due even though the substance may be handled by other dealers. N.C. Gen. Stat. § 105-113.109. Because the North Carolina tax becomes payable within forty-eight hours after the taxpayer comes into possession of the substance, it is not a tax on confiscated goods, as was the case with the Montana tax, which became due only upon the taxpayer’s arrest for possession of the substance. To the contrary, the dealer is not required, when paying the tax, to disclose his or her identity, G.S. § 105-113.108, and any information obtained pursuant to this statute is confidential and cannot be used in a criminal prosecution other than a prosecution for failure to comply with the tax statute itself.

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

N.C. Gen. Stat. § 105-113.112 (1992 & 1994 Cum. Supp.). While we do not pretend to ignore that the high rate of taxation provided by the statute is intended to have a deterrent effect, “these features, [a high tax rate and a deterrent purpose,] in and of themselves, do not necessarily render the tax punitive” *Kurth Ranch*, 511 U.S. at —, 128 L. Ed. 2d at 779 (citation omitted).

In our view, the North Carolina statute is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs. The General Assembly has expressly stated its purpose in enacting the tax as:

The purpose of this Article is to levy an excise tax on persons who possess controlled substances and counterfeit controlled substances in violation of North Carolina law and to provide that a person who possesses such substances in violation of this Article is guilty of a felony. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

N.C. Gen. Stat. § 105-113.105 (1992); *see also* N.C. Gen. Stat. § 105-113.105 (1995) (statute’s purpose reworded to read, in pertinent part: “The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund”).

We hold that the North Carolina Controlled Substance Tax does not have such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause. Therefore, the trial court erred in concluding that prosecution of defendant on the drug possession charges would subject him to double jeopardy in violation of the United States and North Carolina Constitutions. The order of the trial court is reversed, and this case is remanded for further proceedings in the trial division.

Reversed and remanded.

Chief Judge ARNOLD concurs.

Judge SMITH dissents.

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

Judge SMITH dissenting.

I respectfully dissent from the majority's opinion which reverses the trial court and remands.

Initially, it should be noted that this Court's analysis is based upon Chapter 105, Article 2D of the North Carolina General Statutes as it existed on 15 September 1994, the date on which Mr. Ballenger possessed the drugs. Subsequent changes were made to the statute by amendments. Such changes could render my analysis or that of the majority incorrect for cases arising after such changes. However, since the tax was assessed prior to the amendments, we do not address those provisions in the 1995 statute which were added or amended.

In its *Kurth Ranch* opinion, the United States Supreme Court did not hold that in order to find a tax violative of the Double Jeopardy Clause, the tax must contain each of the punishment aspects in the Montana Dangerous Drug Tax. Rather, the Court held that "[t]aken as a whole, [the Montana] drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. —, —, 128 L. Ed. 2d 767, 781 (1994). Violation of the Double Jeopardy Clause "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *United States v. Halper*, 490 U.S. 435, 447, 104 L. Ed. 2d 487, 501 (1989). In *Kurth Ranch*, the Court followed an analysis similar to that set out in *Halper*, looking at the application of the assessment imposed by Montana and holding that it was unconstitutional as applied. Similarly, analysis of the application of the North Carolina Controlled Substance Tax as applied in the instant case leads to what I believe is an inescapable conclusion that criminal conviction following assessment of the tax is additional punishment violative of the Double Jeopardy Clause. For this reason, I dissent.

It should be recognized that the State could prosecute defendant Ballenger criminally if it had not previously punished him for the same offense through the assessment of the tax, or if it had assessed the tax in the same proceeding which resulted in his conviction. See *Kurth Ranch*, 511 U.S. at —, 128 L. Ed. 2d at 778. The fact that defendant was criminally charged for the same conduct for which the North Carolina Controlled Substance Tax was previously assessed requires that we analyze the tax under a Double Jeopardy analysis.

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

The first question presented is whether a civil sanction, more specifically a tax, may constitute punishment for purposes of Double Jeopardy. The Supreme Court has held that a civil sanction may constitute punishment when "the sanction as applied in the individual case serves the goals of punishment." *Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 501. The traditional goals of punishment include retribution and deterrence. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment" *Id.* at 448, 104 L. Ed. 2d at 502. A defendant who has already been subjected to such a sanction may not then be punished a second time through criminal prosecution. Whether an assessment is called "civil" or "criminal" or "tax" or "sanction" does not control when determining whether the assessment is violative of the Double Jeopardy Clause. *See Kurth Ranch*, 511 U.S. at —, 128 L. Ed. 2d at 779; *Halper*, 490 U.S. at 447, 104 L. Ed. 2d at 501.

The United States Supreme Court, as well as the majority in the instant case, held that neither a high rate of taxation nor an obvious deterrent purpose automatically mark a tax as a form of punishment. However, both factors, while not dispositive, are "consistent with a punitive character." *Kurth Ranch*, 511 U.S. at —, 128 L. Ed. 2d at 779. The Supreme Court found that those factors, coupled with other "unusual factors," clearly indicated the Montana tax was a second form of punishment, violative of the Double Jeopardy Clause.

The North Carolina Controlled Substance Tax contains many of the same elements as the Montana tax found to violate Double Jeopardy in *Kurth Ranch*. First, under the Montana statute some of the revenue generated by the tax is devoted to investigation, arrest and prosecution of individuals involved in distribution of drugs. Similarly, in North Carolina, seventy-five percent of the revenue raised from the tax is to be channeled to state and local law enforcement agencies responsible for investigating crimes involving controlled substances. N.C. Gen. Stat. § 105-113.113 (1992). The Montana statute requires law enforcement officers to notify the appropriate taxing authorities when drugs are seized and the North Carolina statutes do not. While the North Carolina statute does not contain the same explicit provision, it obviously encourages the same type of notification since the involved law enforcement agency receives the "lion's share" of any tax collected.

Second, the North Carolina assessment is clearly penal in nature. The statute fails to meet the traditional revenue-raising purpose of a

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

tax. Rather, the preamble provides that the purpose of the tax “is to levy an excise tax on persons who possess controlled substances and counterfeit controlled substances in violation of North Carolina law and to provide that a person who possesses such substances in violation of this Article is guilty of a felony.” N.C. Gen. Stat. § 105-113.105 (1992). Obviously, the intent of the legislature was to impose an additional penalty upon persons who violate the North Carolina criminal drug possession laws. (Added evidence of the legislature’s intent is a 1995 amendment providing an exemption to the tax to those persons in lawful possession of a controlled substance. N.C. Gen. Stat. § 105-113.107A (1995).)

Furthermore, like the Montana tax, the North Carolina tax on marijuana is extremely high at almost \$100.00 per ounce. N.C. Gen. Stat. § 105-113.107 (1992). The tax is payable within 48 hours after a dealer acquires possession of a non-tax-paid controlled substance. If not paid within that time period, the possessor is subjected to a one hundred percent penalty fee and is guilty of a Class I felony. N.C. Gen. Stat. §§ 105-113.109 and -113.110 (1992). (Pursuant to a 1995 amendment, a possessor is now subjected to interest and a penalty of fifty percent of the tax. N.C. Gen. Stat. § 105-113.110A (1995).) Finally, the record reflects that the State has offered no evidence that the amount of the tax correlates in any way with the societal or remedial costs suffered by the State as a result of the taxed activities. These factors considered together are “consistent with a punitive character.” *Id.* at —, 128 L. Ed. 2d at 779.

Third, like the Montana tax, the North Carolina tax is conditioned on commission of a crime. The North Carolina tax is levied against a dealer who possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight. N.C. Gen. Stat. § 105-113.106 (1992). Therefore, the only people subject to the tax are those who, by definition, engage or have engaged in criminal conduct. *See* N.C. Gen. Stat. § 90-95 (1993).

Fourth, like the Montana tax, the North Carolina tax allows assessment of the tax after confiscation or seizure of the controlled substances upon which the assessment is made. Unlike the Montana tax, the North Carolina assessment may also occur prior to or without an arrest, as it is due 48 hours after the dealer possesses the controlled substance. The fact that a person may be assessed a tax on a

STATE v. BALLENGER

[123 N.C. App. 179 (1996)]

substance that he neither owns or possesses when the tax is imposed is further evidence of the punitive nature of the tax. The State argues that, since the Montana tax was a "property" tax, while the North Carolina tax is labeled an "excise" tax, this somehow makes a difference in this analysis. However, the State offers no rationale as to why that would affect the tax's punitive character and I can perceive of none. The North Carolina tax and the Montana tax are both assessed upon persons who are in *possession* of a controlled substance covered by the tax statute.

Also, while the Montana tax expressly provided that the tax was to be collected only after state or federal fines or forfeitures had been satisfied, *Kurth Ranch*, 511 U.S. at —, 128 L. Ed. 2d at 773, the North Carolina tax has no such comparable provision. The North Carolina tax presumably may be assessed and collected before any existent state or federal fines or forfeitures. In my opinion, this is yet another indication of the punitive nature of the North Carolina Controlled Substance tax.

Fifth, as the Supreme Court recognized, taxes upon illegal activities differ from mixed-motive taxes which a state may impose both to deter a disfavored activity and to raise money, such as cigarette and liquor taxes. By imposing such taxes, the State seeks to discourage certain activities. However, because the products provide benefits such as additional employment, consumer satisfaction and increased tax revenues, the government allows the manufacture, sale and use of those items so long as manufacturers, sellers and consumers pay high taxes that reduce consumption. These justifications disappear when a tax is imposed upon an activity which is completely prohibited by the same sovereign which taxes the activity. "[T]he legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." *Kurth Ranch*, 511 U.S. at —, 128 L. Ed. 2d at 780.

Like the Montana tax, the North Carolina Controlled Substance tax is unusual in that it contains punitive as well as tax characteristics. In my view, the North Carolina tax, taken as a whole, is significantly similar to the Montana tax which was found to be violative of Double Jeopardy in *Kurth Ranch*. Like that tax, the North Carolina tax assessed against Mr. Ballenger is a "concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Id.* at —, 128 L. Ed. 2d at 781. For these reasons I would affirm the ruling of the able trial judge.

STATE v. MYERS

[123 N.C. App. 189 (1996)]

STATE OF NORTH CAROLINA v. MARK STEVEN MYERS, DEFENDANT

No. COA95-986

(Filed 16 July 1996)

1. Burglary and Unlawful Breakings § 57 (NCI4th); Appeal and Error § 344 (NCI4th)— burglary and larceny—sufficiency of evidence—failure to renew motion

The trial court did not err by denying defendant's motion to dismiss charges of first-degree burglary and felonious larceny where defendant contended that there was insufficient evidence of a breaking, an entry, and felonious intent, and that there was no evidence that he ever had possession or control of the alleged stolen property because none of it was found in his actual or constructive possession. Although defendant failed to renew his motion to dismiss at the close of all evidence, waiving his objections concerning the sufficiency of the evidence, the Court of Appeals chose to consider the appeal on its merits and, upon reviewing the record, held that the trial court properly denied the motion.

Am Jur 2d, Appellate Review § 671; Burglary §§ 44, 45.**2. Evidence and Witnesses § 2937 (NCI4th)— conduct while in custody—admissible**

The trial court did not abuse its discretion in a prosecution for first-degree burglary and felonious larceny by overruling defense objections to a line of questioning regarding conduct while defendant was in custody awaiting trial. Questions such as these are permissible at the trial court's discretion and defendant failed to show abuse of discretion.

Am Jur 2d, Evidence §§ 301, 530.**3. Evidence and Witnesses § 2301 (NCI4th)— testimony of clinical social worker—defendant laboring under defect of mind or reason—not admissible**

The trial court did not err in a prosecution for first-degree burglary and felonious larceny by sustaining the State's objection to defendant's offer of testimony from a substance abuse counselor and clinical social worker that defendant was laboring under such a defect of reason from disease or deficiency of the mind that he was incapable of knowing the nature and quality of

STATE v. MYERS

[123 N.C. App. 189 (1996)]

his acts, or of distinguishing between right and wrong in relation to those acts at the time of the alleged offense. The witness was asked her opinion on the *M'Naghten* rule, which is a legal term, and there is no evidence in the record to indicate that the witness was qualified to make an assessment under that rule. As the *M'Naghten* rule is a legal standard, a question of whether its determination has been met is a question for the jury.

Am Jur 2d, Criminal Law §§ 57-59, 79; Expert and Opinion Evidence §§ 193, 194, 362, 363.

Modern status of test of criminal responsibility—state cases. 9 ALR4th 526.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALRth 666.

4. Criminal Law § 771 (NCI4th)— long term voluntary intoxication—insanity instruction—refused

The trial court did not err in a prosecution for first-degree burglary and felonious larceny by refusing to submit defendant's requested instruction on the defense of insanity where no evidence tended to show that defendant was suffering from any chronic or permanent insanity and defendant's voluntary intoxication and his actions on the night in question did not justify an instruction on the defense of insanity pursuant to the *M'Naghten* rule.

Am Jur 2d, Criminal Law §§ 61, 80; Trial §§ 1093, 1125, 1279, 1280.

Modern status of test of criminal responsibility—state cases. 9 ALR4th 526.

Construction and application of 18 USCS sec. 17, providing for insanity defense in federal criminal prosecutions. 118 ALR Fed. 265.

5. Criminal Law § 1086 (NCI4th)— Fair Sentencing Act—two offenses—aggravating and mitigating factors—found separately—announced together

The trial court did not err when sentencing defendant for first-degree burglary and felonious larceny by failing to find factors in aggravation or mitigation for both offenses and then sen-

STATE v. MYERS

[123 N.C. App. 189 (1996)]

tencing him to a term in excess of the presumptive. The trial court completed and submitted only one form sheet listing aggravating and mitigating factors, but the transcript clearly reveals that the court stated that the factors were for both charges. The court considered the factors separately for each offense and simply announced the factors jointly.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from jury verdicts and judgments entered 15 March 1995 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 3 June 1996.

Attorney General Michael F. Easley, by Assistant Attorney General John A. Greenlee, for the State.

Aycock, Spence & Butler, by W. Mark Spence, for defendant-appellant.

JOHNSON, Judge.

The State's evidence tends to show that Candace Daniels was awakened in the early morning hours of 16 July 1994 at her family home in Wanchese, North Carolina by noises emanating from the downstairs area of the house. She heard someone turning a door handle, and she awakened her husband and checked on their children. Mr. and Mrs. Daniels both saw a man dressed in a white tee shirt and dark pants in their backyard area, stumbling around and carrying some sort of swinging object. He was observed bending over and placing something down. Mr. Daniels saw the man's face as he walked back toward the house, and at trial identified the man as defendant.

When Mrs. Daniels went downstairs, she found that tongs were lying on the kitchen counter; that a loaf of bread was missing; that the microwave had digits punched; that "smeary" fingerprints were on the microwave pad and cellophane was wadded up on the counter; that margarine, which had been in the refrigerator, was on the counter; and that a plate of turkey was missing from the refrigerator. A dish towel was also found in the yard and was later identified by Mrs. Daniels as being hers and having been in the house.

Mr. Daniels' brother was called to assist in a search for the intruder. Upon the arrival of his brother, Mr. Daniels retrieved his shotgun and left the house with his brother to begin the search. They drove down a nearby road to look for the intruder. As they drove

STATE v. MYERS

[123 N.C. App. 189 (1996)],

slowly down a road near the front of the house, they heard a coughing noise and saw defendant lying in the grass on the side of the road. They yelled at him, but he did not move. Defendant was approximately one hundred (100) feet from the Daniels' residence. He was moaning and throwing up. Defendant could not get up on his own at that time. His vomit looked like white meat, was "bready," and was smeared on his face. There was also a strong smell of chlorine. Mr. Daniels identified defendant as the person he saw in his backyard.

Shortly after Mr. Daniels and his brother located defendant, Sergeant Phillip Etheridge of the Dare County Sheriff's Department arrived. Sergeant Etheridge found a loaf of bread in a neighbor's yard. The plate, which the turkey had been on, was found by Mr. Daniels' son behind the house next door to the Daniels' house. Neither the dish towel, the plate, nor the loaf of bread were found in defendant's possession or near where he was located.

Sergeant Etheridge recognized defendant and patted him down upon his arrival. Defendant had vomit on his face, his clothes and on the ground around him, and was still vomiting at that time. Sergeant Etheridge and another officer, Jay Price, picked defendant up, cleaned him with bottled water and paper towels and placed him in the patrol car. Etheridge noticed the odor of chlorine or bleach and a stringy meat-like substance and dough-like substance in the vomit. Defendant was impaired and very sick when Etheridge picked him up. Etheridge did not question defendant that evening due to his condition. Etheridge included in his report of the evening's events that "Mr. Myers was covered with vomit and incoherent." Etheridge did not advise defendant of his *Miranda* rights because he felt that defendant would not understand him in his condition. Etheridge was of the opinion that defendant was impaired from the use of alcohol and drugs. Etheridge testified that one of the reasons that he did not Mirandize defendant was that defendant was incapable of thinking or planning or making decisions at that time.

Defendant testified that he had consumed a considerable quantity of alcohol earlier that day, and believed that he was trying to reach a location where he sometimes spent the night. He claimed to vaguely recall bright lights and an officer questioning him. Defendant's other evidence tends to show that defendant developed a problem with the use and abuse of alcohol at approximately eighteen years of age. He became dependent on alcohol shortly after he turned eighteen while living in Virginia Beach, Virginia.

STATE v. MYERS

[123 N.C. App. 189 (1996)]

Defendant stated that he first needed treatment for his abuse of alcohol when he was in his early twenties, and that he was treated in an institution for alcoholism in the early 1980's. He was committed to Tidewater Psychiatric Institute in Virginia on several occasions. Subsequently, he was treated at the Eastern State Mental Hospital in Virginia for alcohol abuse. He never successfully completed any of those treatment programs. Following participation in each of those programs, he eventually resumed his drinking pattern.

Defendant eventually moved from Virginia Beach to Dare County, North Carolina approximately ten years prior to the date of the offense. During that period of time, he continued to drink and continued to have problems with the police. During the last ten years, he has been treated and counseled at the Albemarle Mental Health Center in Manteo, North Carolina, beginning in early 1994. In addition, in early 1994, defendant enrolled in the "Teen Challenge" program operated in Dare County. He was there approximately forty (40) days, but left Teen Challenge and began drinking again. After leaving Teen Challenge, he lived wherever he could find shelter—on Roanoke Island, North Carolina in an old vehicle which was not operable, on the porches of abandoned homes, etc. During this period of time, defendant consumed, during the course of a day, three (3) to four (4) quarts of beer which he purchased with money raised by panhandling, doing odd jobs, and with food stamps. Between May and July of 1994, defendant was seen regularly by Ms. Bonnie Meadows, a substance abuse counselor at the Albemarle Mental Health Center in Manteo.

Defendant was diagnosed, prior to this alleged offense, by the Albemarle Mental Health Center as alcohol dependent, having a personality disorder (schizotypal traits), and was prescribed anti-depressant medications by the Mental Health Center psychiatrist. This diagnosis was confirmed by Dr. James G. Groce, M.D., Associate Director of Forensic Psychiatry at Dorothea Dix Hospital on 30 January 1995 during a court-ordered evaluation which revealed an unspecified personality disorder with schizoid traits and alcohol dependence.

Defendant had been convicted in excess of one hundred (100) times of public drunkenness and affrays arising from his drinking. He also had been convicted of two (2) prior felony breaking and entering charges. Defendant was intoxicated during the commission of each of his prior convictions.

STATE v. MYERS

[123 N.C. App. 189 (1996)]

Further evidence included the testimony of Carolyn Carver, a substance abuse counselor and clinical social worker. She testified that while she believed defendant suffered from alcohol dependency and some sort of personality disorder, perhaps associated with organic damage caused by alcohol abuse, she could not affirmatively diagnose a mental defect not arising as a result of intoxication. Ms. Carver testified that she did not believe defendant was capable of planning or deliberating an intentional act at the time of the offense at issue. Additionally, she opined that as a result of the consumption of alcohol, defendant's mental processes were overcome to the extent that he had lost his capacity to think and to plan or to form any specific intent to do any particular act. Moreover, Ms. Carver opined that at the time of the alleged offense, defendant was laboring under such a defect of reason from disease or deficiency of the mind as to be incapable of knowing the nature and quality of his acts. Although she believed defendant was experiencing an alcohol-induced black-out during the time of the crime, she admitted that she could not be certain about this except as the events were recounted to her by defendant. Permanent brain damage impairing judgment as a result of chronic alcohol abuse (organicity) cannot be confirmed except by autopsy, to Ms. Carver's knowledge.

The State objected to her testimony regarding that opinion, and Judge Parker sustained the objection. Ms. Carver testified that during the interview, defendant was at times very confused, paranoid and suspicious. Defendant stated to the investigating officer and to Ms. Carver that he had no recollection of the evening in question.

Following the trial, a jury returned guilty verdicts to first degree burglary and felonious larceny. The trial court sentenced defendant on the charge of first degree burglary to twenty (20) years and on the charge of felonious larceny to five (5) years, to run consecutively, in the custody of the North Carolina Department of Correction. Defendant appeals.

[1] Defendant argues first that the trial court erred in denying his motion to dismiss all of the charges on the grounds that the evidence was insufficient to support a conviction in that there was insufficient evidence of a breaking, insufficient evidence of an entry and insufficient evidence of felonious intent. Furthermore, defendant argues that because no property allegedly stolen from the residence was found in his actual or constructive possession, no evidence existed which indicated that he had ever had possession or control of any of

STATE v. MYERS

[123 N.C. App. 189 (1996)]

the alleged stolen property. We disagree, and find defendant's arguments to be without merit.

A careful review of the record reveals that although defendant made a motion to dismiss all charges against him at the close of the State's evidence, the motion was denied, and defendant presented evidence and failed to renew the motion, at the close of all of the evidence. Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure provides that:

If a defendant makes [a motion to dismiss] after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. . . . However, if a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(6)(3). Accordingly, defendant has waived his objections concerning the sufficiency of the evidence.

Nevertheless, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we have chosen to consider the appeal on its merits. *See State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985). Upon our review of the record, we believe that the trial court properly denied defendant's motion to dismiss. *See State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Therefore, defendant's first and second assignments of error fail.

[2] Defendant next argues that the trial court erred in overruling his objections to a line of questioning by the district attorney regarding alleged conduct, charges of rule violations and disruptions allegedly occurring while defendant was in custody awaiting trial on the charges since the line of questioning was irrelevant, immaterial and tended to prejudice the jury against him. Specifically, defendant argues that the evidence concerning discipline problems at the Detention Center was irrelevant as to the question of whether he committed the offense. *See* N.C.R. Evid. 401. Defendant also argues that this evidence was used to question his character or a trait of his

STATE v. MYERS

[123 N.C. App. 189 (1996)]

character. Thus, he concludes that this evidence was irrelevant and therefore inadmissible.

The State, however, argues that the questions were used to impeach defendant's credibility, and were relevant concerning the antisocial and disruptive behavior of defendant. *See State v. King*, 224 N.C. 329, 30 S.E.2d 230 (1944) (finding that questions concerning a defendant's antisocial behavior, even though collateral to the acts constituting crimes for which he was being tried, were clearly allowed for impeachment purposes). Questions such as the ones asked here on cross-examination are permissible at the trial court's discretion. *State v. Currie*, 293 N.C. 523, 283 S.E.2d 477 (1977). Defendant has failed to show that the trial court abused its discretion, therefore, his argument fails.

[3] Defendant also argues that the trial court erred in sustaining the State's objection to his offer of the testimony of Carolyn Carver that defendant was laboring under such a defect of reason from disease or deficiency of the mind that he was incapable of knowing the nature and quality of his acts, or of distinguishing between right and wrong in relation to those acts at the time of the alleged offense. Out of the presence of the jury, defendant made the following offer of proof:

Q Whether or not at the time Mr. Myers had the—was laboring under such a defect of reason from disease or deficiency of the mind as to be incapable of knowing the nature and quality of his actions. Do you have an opinion as to that?

A Yes, I do.

Q What is your opinion?

A I know from my experience with working with Mr. Myers that he decompensates or gets worse, his symptomology is more expansive and greater when he's under the influence of alcohol and based upon what I've heard regarding his consumption that day and his level of intoxication, I don't believe that he could.

Q Okay. And do you have an opinion based on all of those same things as to whether Mr. Myers was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to those actions at the time of this alleged offense?

A Yes, I do.

STATE v. MYERS

[123 N.C. App. 189 (1996)]

Q What is your opinion as to that?

A That is, his judgment and impulse control would be so impaired that he would not have an awareness of right and wrong.

Defendant argues that an expert is allowed to testify about diminished mental capacity, and the ability “to make and carry out plans,” *State v. Shank*, 322 N.C. 243, 248, 367 S.E.2d 639, 643 (1988), even though these opinions embrace legal terms and would “confuse, rather than help,” the jury. *State v. Weeks*, 322 N.C. 152, 166-67, 367 S.E.2d 895, 904 (1988). He alleges that Ms. Carver was only asked whether she had an opinion as to whether defendant was suffering from a mental defect or disease at the time of the alleged commission of the offense which did or did not fit within the legal framework of the insanity defense in North Carolina.

The State argues that defendant was attempting to have Ms. Carver state an opinion as to whether defendant was legally insane, i.e., legally guilty or not within the M’Naghten rule, the legal test for insanity in North Carolina. A defendant in North Carolina can be exempt from criminal responsibility for an act by reason of insanity, if he is able to prove that at the time of the offense:

he was laboring under such a defect of reason from disease or deficiency of mind as to be incapable of knowing the nature and quality of his act or, if he did know this, of distinguishing between right and wrong in relation to the act.

State v. Bonney, 329 N.C. 61, 78, 405 S.E.2d 145, 155 (1991); *see also State v. Frank*, 300 N.C. 1, 265 S.E.2d 177 (1980).

Our Courts have consistently held that (1) “even qualified expert witnesses may not give opinion testimony concerning legal terms that have specific meanings not readily apparent to the witness or that have definitions that vary from the common definition of the term,” *State v. Brown*, 335 N.C. 477, 489, 439 S.E.2d 589, 596 (1994), and (2) expert opinion evidence is inadmissible when “it involved a conclusion that a legal standard had or had not been met. . . . ‘That determination is for the finder of fact.’” *State v. Mash*, 328 N.C. 61, 65-66, 399 S.E.2d 307, 310-11 (1991) (citations omitted). In this action, Ms. Carver was asked her opinion on the M’Naghten rule, which is a legal term. There was no evidence in the record to indicate that the witness was qualified to make an assessment under that rule. Moreover, since defendant was seeking to have the witness state to the jury whether

STATE v. MYERS

[123 N.C. App. 189 (1996)]

the legal standard had been satisfied, thereby engaging in application of a legal standard, defendant's argument fails. Mental health experts are in no better position than the jury to determine whether a legal standard has been met. *Weeks*, 322 N.C. 152, 367 S.E.2d 895. As the M'Naghten rule is a legal standard, a question of whether its determination has been met is a question for the jury; thus, the trial court did not err. *Id.*

[4] Defendant next argues that the trial court erred in refusing to submit his requested instruction on the defense of insanity. We disagree.

Ms. Carver testified that she had counseled, diagnosed and treated defendant extensively during the spring and summer of 1994; that she reviewed reports and medical records from psychiatric and mental institutions which had treated him in the past, including records from Eastern State Mental Hospital, Tidewater Psychiatric Institute and Dorothea Dix Hospital in Raleigh, North Carolina; that defendant suffered from several different disorders including alcohol dependency and schizotypal disorder; that at the time of the alleged offense, defendant was experiencing an alcohol-induced blackout and his mental processes, as a result of the consumption of alcohol, was overcome to the extent that he had lost his capacity to think, plan or form any specific intent to do any particular act; and that defendant suffered from alcohol organicity and other mental disorders at the time of the alleged offense.

This testimony tended to show that defendant suffered from several different disorders including alcohol dependency, schizotypal disorder, and longstanding alcohol abuse resulting in organicity. According to defendant, these factors, when considered together with his alcohol abuse on the day of the offense, rendered defendant unable to form the requisite specific intent to commit the alleged offenses. Thus, defendant contends that the trial court's failure to give the requested instruction on the defense of insanity was in error.

Notwithstanding defendant's contention, in order for the requested instruction to be submitted to the jury, evidence of chronic or permanent insanity not induced by the voluntary ingestion of alcohol or drugs must exist. *See State v. Austin*, 320 N.C. 276, 357 S.E.2d 641, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). The State contends that defendant failed to produce evidence of chronic or permanent insanity, not produced by the voluntary consumption of alcohol, as there was no medical diagnosis of permanent or chronic incapaci-

STATE v. MYERS

[123 N.C. App. 189 (1996)]

tation of defendant's ability to distinguish right from wrong arising from a disease of the mind. Ms. Carver further testified that although she believed that defendant suffered from "organicity," she was unable to form a diagnosis "as to the organic difficulty." Moreover, the State contends that Ms. Carver's qualifications do not show that she was qualified to offer any medical diagnoses on insanity, either permanent or chronic, and that she admitted that any organic syndrome that may have been present was undiagnosable except upon autopsy. Finally, Ms. Carver's own notes of her visit with defendant shortly after his arrest reflected that "his affect was bright w/ normal mood. His thought process was clear and coherent."

Accordingly, as no evidence tended to show that defendant was suffering from any chronic or permanent insanity, the evidence did not warrant an instruction on the defense of insanity. *See State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980); *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977). The trial court did not err in failing to instruct on the defense of insanity, as defendant's voluntary intoxication and his actions on the night in question did not justify an instruction on the defense of insanity pursuant to the M'Naghten rule. Therefore, this assignment of error is without merit.

[5] Defendant next argues that the trial court erred in failing to find factors in aggravation and/or mitigation for both offenses for which he was convicted and, therefore, erred in sentencing him to a term of years in excess of the presumptive fair sentencing, as separate findings of aggravating and mitigating factors are required to be made for each offense. This argument is also without merit.

The trial court completed and submitted only one form sheet listing the aggravating and mitigating factors, but a review of the transcript clearly reveals that the trial court stated "[t]hese aggravating factors go as to both the burglary and felonious larceny charge [and] as to mitigating factors to both charges. . . . "Thus, it is clear that the validity of the judgments and sentencing were sufficient pursuant to North Carolina General Statutes section 15A-1340.4 (1988) (repealed, effective 1 October 1994). The trial court considered the factors separately for each offense and simply announced the factors jointly. *See State v. Hall*, 81 N.C. App. 650, 652-53, 344 S.E.2d 811, 813, *petition for cert. dismissed as moot*, 318 N.C. 510, 349 S.E.2d 868 (1986) (finding that failure of trial judge to complete another aggravating and mitigating factor form sheet "was not a judicial error; it was but a minis-

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

terial oversight that did no prejudice to defendant.”). Thus, this argument must fail.

For the reasons stated herein, we find that defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and MARTIN, MARK D. concur.

PEGGY S. FRANKLIN v. BROYHILL FURNITURE INDUSTRIES, (SELF-INSURED)
AND TRIGON ADMINISTRATORS (ADMINISTERING AGENT)

No. COA95-1031

(Filed 16 July 1996)

1. Workers’ Compensation § 453 (NCI4th)— findings of Industrial Commission—binding on appeal

There was competent evidence to support the Industrial Commission’s findings in a workers’ compensation case and those findings are binding on appeal.

Am Jur 2d, Workers’ Compensation § 709.

2. Workers’ Compensation § 254 (NCI4th)— temporary total disability—maximum medical improvement—subsequent disability

The Industrial Commission improperly awarded plaintiff in a workers’s compensation case temporary total disability after the date on which the Commission determined that plaintiff reached maximum medical improvement; temporary total disability is payable only during the healing period, which ends when an employee reaches maximum medical improvement.

Am Jur 2d, Workers’ Compensation §§ 382, 431.

3. Workers’ Compensation § 256 (NCI4th)— permanent partial disability—Form 21 presumption—impaired earning capacity

The Industrial Commission erred in a workers’ compensation action after concluding that plaintiff could recover permanent partial disability pursuant to N.C.G.S. § 97-31 by implicitly deter-

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

mining that plaintiff is not entitled to any disability pursuant to N.C.G.S. § 97-29 because it did not apply the presumption which arose upon the approval of the executed Form 21 agreement and thus improperly placed the burden on plaintiff. Upon the determination of plaintiff's N.C.G.S. § 97-31 disability, it was incumbent on the Commission to determine whether plaintiff was entitled to either permanent total disability pursuant to N.C.G.S. § 97-29, or permanent partial disability pursuant to N.C.G.S. § 97-30. Furthermore, because plaintiff's permanent work restrictions, which defendant does not dispute, support a finding that she is at least permanently partially disabled, and because there are no findings by the Commission that plaintiff justifiably refused employment procured by defendant which was suitable to this reduced capacity, it was error not to at least determine the amount of plaintiff's impaired earning capacity pursuant to N.C.G.S. § 97-30.

Am Jur 2d, Workers' Compensation §§ 381, 382.**4. Workers' Compensation § 224 (NCI4th)— treatment by unauthorized physician—approval within discretion of Commission**

There was no error in the Industrial Commission's conclusion in a workers' compensation action that defendant is not liable for the treatment of plaintiff by a doctor for whose treatment plaintiff did not seek authorization and because the treatment did not provide relief, effect a cure or lessen the period of disability. Even assuming that plaintiff's requests for authorization were sufficient, the approval of a physician lies within the discretion of the Commission pursuant to N.C.G.S. § 97-25 and plaintiff has not alleged, nor did the Court of Appeals find, any abuse of discretion. Earlier cases which required that the Commission's order of approval or disapproval of plaintiff's chosen physician be based upon findings of whether the medical care was reasonably required to effect a cure or give relief were based upon language subsequently deleted from the statute by the legislature.

Am Jur 2d, Workers' Compensation §§ 436, 437.

Judge WALKER concurring.

Appeal by plaintiff and defendant from Opinion and Award for the Full Commission entered 17 May 1995. Heard in the Court of Appeals 17 May 1996.

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

Daniel & LeCroy, P.A., by M. Alan LeCroy, for plaintiff-appellant/appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Linda Hinson Ambrose and Erica B. Lewis, for defendant-appellee/appellant.

GREENE, Judge.

Peggy S. Franklin (plaintiff) and Broyhill Furniture Industries (defendant) appeal from the 17 May 1995 Opinion and Award of the North Carolina Industrial Commission (Commission) which, pursuant to the Worker's Compensation Act, awarded plaintiff temporary total disability compensation, partial permanent disability, pursuant to N.C. Gen. Stat. § 97-31, future medical expenses, and a reasonable attorney fee and directed defendant to pay costs.

Plaintiff, "a 40 year old, tenth grade educated female" worked for defendant from September 1989, until 19 February 1992, as a rough end worker. On 15 January 1992, while working for defendant, plaintiff sustained a compensable injury by accident, "when she tripped and fell, landing on both knees." On 28 February 1992, the parties executed a Form 21 Agreement for Compensation for Disability, which stipulated that plaintiff suffered an "injury by accident arising out of and in the course of [her] employment" to her left knee and further agreed that plaintiff sustained a disability from the injury and provided weekly compensation "beginning February 26, 1992 and continuing for [a period] to be determined." Defendant paid temporary total disability to plaintiff pursuant to this Form 21 until the entry of the Deputy Commissioner's Opinion and Award in this case.

Plaintiff was treated "for complaints of left knee pain" by Dr. Stephen G. Fleming (Fleming), and on 26 March 1992 Fleming "excised a loose body and fibrotic fat pad from plaintiff's left knee" and ordered physical therapy. Plaintiff saw three doctors after Fleming's treatment, one of whom was to administer work hardening therapy and one, Dr. Walton Curl (Curl), whose treatment the Commission found was "not authorized by the defendant and was not authorized by the Industrial Commission except for a one time visit."

The Commission made the undisputed finding that all of plaintiff's physicians "have opined that plaintiff is capable of performing some range of sedentary work with restrictions, which include a permanent four (4) hour per day restriction, recommended self-pacing,

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

no bending, no stooping, no climbing, and no kneeling.” The Commission also found that plaintiff “reached maximum medical improvement on January 4, 1993”¹ and that “she retains a 20% permanent partial impairment to her left leg.” Because, the Commission found that plaintiff had reported no problems with her right leg, the Commission did not accept Curl’s impairment rating of 20% as to plaintiff’s right leg.

Based upon its findings of fact, the Commission made the following relevant Conclusions of Law:

1. As a result of the compensable injury, the plaintiff retains a 20% permanent partial disability to her left leg, for which she is entitled to 40 weeks of compensation should she choose to elect to receive this benefit. N.C.G.S. 97-31(15).

....

4. The plaintiff has failed to prove by competent or convincing evidence that she is unable to work or obtain any employment. All of the medical evidence establishes that plaintiff has exaggerated complaints, has refused treatment, and has refused to cooperate with functional evaluations even after being ordered to comply on two occasions by Chief Deputy Commissioner Sellers.

5. Dr. Curl’s treatment did not provide relief, effect a cure, or lessen the period of disability as plaintiff admits that she received no relief, cure, or lessening of disability from his treatment. Furthermore, the plaintiff did not request authorization to seek treatment by Dr. Curl from either the defendant or the Commission. Therefore, the defendant is not liable for this unauthorized treatment beyond the first visit.

6. The plaintiff is entitled to temporary total disability compensation until the end of the healing period [citation omitted]

As it appears that plaintiff remained incapable as of the time of the initial decision of earning wages, plaintiff is entitled to continued temporary total disability compensation from May 25, 1993 and continuing until such time as she returns to work within her restrictions or until further order by the Commission. . . .

1. Although denominated a conclusion of law, we treat this statement as a finding of fact, as it does not require the application of legal principles. *Gainey v. North Carolina Dept. of Justice*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36-40 (1996).

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

Accordingly, the Commission awarded plaintiff temporary total disability compensation from 25 May 1993 until she returns to work within her restrictions, future medical expenses incurred by plaintiff as a result of these injuries, reasonable attorney fees, and ordered that defendant pay the costs of the hearing.

On 8 June 1995, defendant made a motion for reconsideration, requesting that the Commission reconsider its award of temporary total disability, because plaintiff did, in fact, return to work when she began her job at Domino's. The Commission denied defendants' motion on 13 June 1995. Plaintiff appealed from the Commission's 17 May 1995 order and the defendant cross-appealed from that same order.

The issues are whether (I) the Commission's findings are supported by competent evidence; (II) the Commission's conclusion granting plaintiff temporary total disability and denying plaintiff permanent disability are supported by the findings; and (III) the Commission erred in not awarding plaintiff the costs of her treatment by Curl.

I

[1] The Commission's findings are binding on appeal if they are supported by competent evidence.² *Andrews v. Fulcher Tire Sales and Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995). Moreover, the Commission may reject all or any part of any witness' testimony. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982). Both parties raise the issue of whether the findings are supported by the evidence. We have reviewed the evidence in this case, and determine that there is competent evidence to support the findings.

II

[2] Temporary total disability is payable only "during the healing period." N.C.G.S. § 97-31 (1991); *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 329-30 (1985). The "healing

2. In determining whether the evidence is competent, we "must by definition apply those courtroom evidentiary rules and principles which embody the legal concept of 'competence.'" *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97-98, 360 S.E.2d 109, 110 (1987); see *Johnson v. Charles Keck Logging*, 121 N.C. App. 598, 468 S.E.2d 420 (determining that blood alcohol test was incompetent evidence and could not support a finding of intoxication, in that there was "insufficient evidence to establish that [the] critical blood alcohol analysis was scientifically reliable"), *disc. rev. denied*, 343 N.C. 306, 471 S.E.2d 71 (1996).

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

period” ends when an employee reaches “maximum medical improvement.” *Id.* Only when an employee has reached “maximum medical improvement” does the question of her entitlement to permanent disability arise.

Once an employee has reached her “maximum medical improvement,” she may establish permanent incapacity pursuant to either section 97-29, -30, or -31. An employee may recover for an injury to a specifically listed body part, pursuant to N.C. Gen. Stat. § 97-31, or for any inability to earn wages, resulting from injury to that body part, pursuant to N.C. Gen. Stat. § 97-29 or -30. The employee, however, may not recover pursuant to section 97-31 and section 97-30 (or 97-29) simultaneously, but has the option of choosing the more favorable recovery. *Gupton v. Builders Transp.*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987). When incapacity arises from both a scheduled, section 97-31 injury and a non-scheduled injury, recovery is permitted for both the scheduled injury, pursuant to section 97-31, and any incapacity from the non-scheduled injury, pursuant to section 97-29 or section 97-30. *Gray v. Carolina Freight Carriers*, 105 N.C. App. 480, 485, 414 S.E.2d 102, 105 (1992).

An employee seeking disability compensation must establish the existence and extent of her disability. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994); *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 731, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991). Disability refers to decreased earning capacity. *Tyndall*, 102 N.C. App. at 730, 403 S.E.2d at 550. To receive compensation for a permanent total disability, an employee must show that she is “totally unable to ‘earn wages which . . . [she] was receiving at the time [of injury] in the same or any other employment.’” *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Tyndall*, 102 N.C. App. at 730, 403 S.E.2d at 550). A reduction in wages resulting from a compensable injury will only support permanent partial disability and not a total disability. *See Tyndall*, 102 N.C. App. at 731, 403 S.E.2d at 551. Once the Commission approves a Form 21 Agreement between the parties, the employee receives the benefit of a presumption that she is totally disabled.³ *See Stone v. G & G Builders*, 121 N.C. App. 671, 674, 468 S.E.2d 510, 512 (1996). Thus, the approval of the Form 21 by the Commission relieves the employee of her initial burden.

3. We do not address, as the issue is not presented in this case, the effect of a Form 21 agreement that sets disability for a specified period of time and the matter appears for its initial hearing before the Industrial Commission (or a deputy commissioner) after the expiration of that specified period of time.

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

Upon a showing of disability by the employee, including the approval of an executed Form 21, the employer may produce evidence that suitable jobs are available for the employee and “ ‘that the [employee] is capable of getting one,’ ” taking the employee’s physical and vocational limitations into account. *Burwell*, 114 N.C. App. at 73, 441 S.E.2d at 149 (quoting *Kennedy v. Duke Univ. Medical Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)). A job is “suitable” if the employee is capable of performing the job, given her “age, education, physical limitations, vocational skills, and experience.” *Id.* An employee is “capable of getting” a job if there is “ ‘a reasonable likelihood . . . that [she] would be hired if [she] diligently sought the job.’ ” *Id.* at 73-74, 441 S.E.2d at 149 (quoting *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)).

Once the employer produces evidence that disputes the employee’s disability, the employee may “produc[e] evidence that either contests the availability of other jobs or [her] suitability for those jobs, or establishes that [she] has unsuccessfully sought the employment opportunities located by her employer.” *Id.* at 74, 441 S.E.2d at 149.

At any point, however, the employer may show that the employee has unjustifiably “refuse[d] employment procured for [her] suitable to [her] capacity,” and if the employer’s evidence is accepted by the Commission, the employee is not entitled to any benefits pursuant to section 97-29 or section 97-30. N.C.G.S. § 97-32 (1991); *McCoy v. Oxford Janitorial Serv. Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 665 (1996).

Temporary Disability

In this case, the Commission determined, and plaintiff does not dispute, that plaintiff reached maximum medical improvement on 4 January 1993. Thus, it was improper to award the plaintiff temporary total disability after this date.

Permanent Disability

[3] The Commission concluded that plaintiff could recover permanent partial disability, pursuant to section 31, based upon her scheduled knee injury. This conclusion is not disputed by either party. Upon the determination of plaintiff’s section 97-31 disability, it was incumbent on the Commission to determine whether plaintiff was entitled to either permanent total disability, pursuant to section 97-29, or per-

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

manent partial disability, pursuant to section 97-30. The Commission erred in its implicit determination that plaintiff is not entitled to any disability pursuant to section 97-29, because it did not apply the presumption which arose upon the approval of the executed Form 21 agreement and thus, improperly placed the burden on the plaintiff. Furthermore, because the plaintiff's permanent work restrictions, which defendant does not dispute, support a finding that she is at least permanently, partially disabled, *see Stone*, 121 N.C. App. at 674, 468 S.E.2d at 512, and because there are no findings by the Commission that plaintiff unjustifiably refused employment procured by defendant, which was suitable to this reduced capacity, it was error not to at least determine the amount of plaintiff's impaired earning capacity, pursuant to section 97-30. Accordingly, the case must be remanded for application of the appropriate standard and if the Commission determines that plaintiff is entitled to benefits pursuant to section 97-29, or section 97-30, the plaintiff is entitled to choose whether to recover for her scheduled disability, pursuant to section 97-31, or for any permanent incapacity, pursuant to section 97-29 or section 97-30.

III

[4] The Commission concluded that defendant is not liable for Curl's treatment of plaintiff, because plaintiff did not seek authorization for this treatment and because Curl's treatment "did not provide relief, effect a cure or lessen the period of disability." Plaintiff argues that this conclusion is error, because "plaintiff requested authorization of Dr. Curl's medical treatment five different times" and the Commission never responded to these requests.

Even assuming that plaintiff's requests for authorization were sufficient, the approval of a physician, pursuant to N.C. Gen. Stat. § 97-25, lies within the discretion of the Commission. The present statute, which is the one applicable to this case, reads:

Medical compensation shall be provided by the employer. . . . Provided, however, if he so desires, an injured employee may select a physician of his own choosing . . . subject to the approval of the Industrial Commission.

N.C.G.S. § 97-25 (1991). The unambiguous language of this statute, thus, leaves the approval of a physician within the discretion of the Commission and the Commission's determination may only be reversed upon a finding of a manifest abuse of discretion. *See White*

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (where matters left to fact finder's discretion, may only reverse upon finding of manifest abuse of discretion). Plaintiff has not alleged, nor do we find, any abuse of discretion.

We are aware that earlier cases required that a Commission's order of approval or disapproval of the plaintiff's chosen physician be based upon findings whether the medical care was "reasonably required to effect a cure or give relief." *Roberts v. ABR Assocs., Inc.*, 101 N.C. App. 135, 142, 398 S.E.2d 917, 920 (1990); *Schofield v. The Great Atlantic & Pacific Tea Co.*, 299 N.C. 582, 594-95, 264 S.E.2d 56, 64 (1980). That language, however, was taken directly from the statute itself and the language was subsequently deleted by our legislature. N.C.G.S. § 92-25 (pre 1991 amendment).

Reversed and remanded.

Judge MARTIN, John C., concurs.

Judge WALKER concurs with separate opinion.

Judge WALKER concurring.

I concur with the majority opinion in this case and agree that the case must be remanded to the Industrial Commission (the Commission) to determine whether plaintiff was entitled to either permanent total disability, pursuant to section 97-29, or partial disability, pursuant to section 97-30. I also agree that the Commission improperly placed the burden of establishing disability on the plaintiff because it failed to apply the presumption which arose upon the approval of the executed Form 21 when it concluded that plaintiff failed to prove that she was unable to work or obtain any employment.

It is well established that upon the signing of a Form 21 agreement for temporary total disability benefits, the plaintiff is entitled to a presumption of continuing total disability. *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 283-4, 458 S.E.2d 251, 257, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 507 (1995). Although the plaintiff in this case did not argue that she was entitled to this presumption, numerous decisions by our Court have held that where there has been a previous determination that the employee is disabled as evidenced by the approval of a Form 21, the employee is entitled to a presump-

FRANKLIN v. BROYHILL FURNITURE INDUSTRIES

[123 N.C. App. 200 (1996)]

tion of continuing disability. *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971); *But see Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). Thus, where the parties entered into a Form 21, it was error for the Commission not to apply a presumption of continuing total disability irrespective of whether this issue was raised by the plaintiff.

I write separately to elucidate what is required by the employer to rebut the presumption of total disability which arises upon the approval of a Form 21. The presumption of total disability may be rebutted not only by a showing of the capacity to earn the same wages, but also by a showing of the capacity to earn lesser wages.

For example, the presumption of total disability may be rebutted by evidence that the employee is capable of earning **some** wages, albeit wages less than the wages earned at the time of injury. Specifically, the employer must produce evidence that:

- (1) suitable jobs are available for the employee;
- (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations;
- (3) and that the job would enable employee to earn some wages.

In cases where the employer produces such evidence, the burden shifts back to the employee to show either that jobs are not available, they are not suitable considering his/her condition, or he/she has unsuccessfully sought employment opportunities by the employer. *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 732, 403 S.E.2d 548, 551, *cert. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991). Where the employee fails to meet this burden, the plaintiff continues to be disabled but the disability changes from a total disability to a partial disability under section 97-30, due to impaired earning capacity. *See Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 398 S.E.2d 677 (1990).

In addition, an employer may rebut the presumption of total disability by producing evidence that the employee is capable of returning to work at wages equal to those the employee was receiving at the time of injury in order to show that the employee is no longer disabled. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994). Upon this showing, the burden then shifts to the employee to show that he/she is disabled as defined by the Workers' Compensation Act.

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

At any point, however, the employer may show that the employee has unjustifiably "refuse[d] employment procured for [her] suitable to [her] capacity." N.C. Gen. Stat. § 97-32 (1991). If this evidence is accepted by the Commission, the employee is precluded from receiving benefits pursuant to sections 97-29 or 97-30. *McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 664-65 (1996).

IN THE MATTER OF: THE APPEAL OF CAMEL CITY LAUNDRY COMPANY FROM
THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE FORSYTH COUNTY
BOARD OF EQUALIZATION AND REVIEW FOR 1990

No. COA95-749

(Filed 16 July 1996)

1. Taxation § 79 (NCI4th)— contaminated property—reappraisal in nonreappraisal year

The North Carolina Property Tax Commission properly concluded that a nonreappraisal year valuation was justified where the Commission found that the extent of subsurface soil and shallow groundwater contamination was not known as of the date of the last regular appraisal. N.C.G.S. § 105-287.

Am Jur 2d, State and Local Taxation § 20.

Valuation for taxation purposes as admissible to show value for other purposes. 39 ALR2d 209.

2. Evidence and Witnesses § 672 (NCI4th)— Property Tax Commission—rehearing after appeal—objection to additional evidence

The North Carolina Property Tax Commission did not err in receiving additional evidence of the value of contaminated property where, following the mandate on remand after an appeal, the Commission allowed the property owner, Camel City, to offer additional evidence, the County objected, the Commission then continued the hearing, and the County elected to offer its own additional evidence. The County cannot now be heard to complain about the receipt of Camel City's additional evidence.

Am Jur 2d, Trial §§ 734, 735, 737.

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

3. Taxation § 82 (NCI4th)— contaminated real property— valuation

The North Carolina Property Tax Commission acted within its authority in valuing property with contaminated subsurface soil and ground water at \$430,872 and this value was supported by competent, material and substantial evidence even though the property owner (Camel City) contended that the value was \$0.00. The Commission was presented with two vastly different estimates of the tax value of the subject property and, apparently placing greater weight on the County's income-approach "value in use" method of valuing the property, concluded that the County properly considered the affects of the contamination in its appraisal of the "true value in money" of the property. The function of determining the weight and sufficiency of the evidence and the credibility of the expert witnesses presented by the parties belonged exclusively to the Commission and Camel City has not shown that the County's method of valuing the property was illegal or arbitrary or that the County's assessment exceeded the true value in money of the property.

Am Jur 2d, State and Local Taxation § 20.

Valuation for taxation purposes as admissible to show value for other purposes. 39 ALR2d 209.

Appeal by petitioner Camel City Laundry Company from final decision entered 24 January 1995 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 21 March 1996.

Stern, Graham & Klepfer, L.L.P., by James W. Miles, Jr. and William A. Eagles, for petitioner-appellant.

Office of the Forsyth County Attorney, by Bruce E. Colvin, for respondent-appellee.

WALKER, Judge.

Appellant Camel City Laundry Company (Camel City) is the owner of certain property located in Forsyth County at 501 East Third Street, Winston-Salem, North Carolina (Tax Block 40, Lot 301). The property measures 53,600 square feet (1.23 acres) and contains a 25,486-square-foot building and a paved parking lot with 56 spaces.

Prior to Camel City's acquisition of the property, the property was successively owned by Winston-Salem Gas and Lighting Company,

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

Duke Power Company, and Piedmont Natural Gas Company, all of whom used the property as an industrial site. Upon acquiring the property, Camel City used it as a commercial dry-cleaning/laundry processing plant until 1989, when Camel City converted the property into office space and a laundry and customer service facility.

Effective 1 January 1988, as part of its county-wide reappraisal of real property pursuant to N.C. Gen. Stat. § 105-286, appellant Forsyth County (the County) valued the subject property for tax purposes at \$639,000. In 1989, Camel City received an offer to purchase the subject property for \$750,000, contingent upon a satisfactory environmental assessment. Two ensuing assessments revealed that both the subsurface soil and the shallow groundwater table were contaminated by pollutants. Although Camel City's operations contributed to the contamination, the primary source was the coal gasification plant operated by the property's previous owners. There was no evidence that the contamination negatively affected the building's interior or the parking lot.

[1] On 29 May 1990, Camel City requested that the Forsyth County Board of Equalization and Review for 1990 (the Board) review the \$639,000 ad valorem tax value placed upon the subject property, alleging that due to the contamination, the true value of the property was \$0. 1990 was a non-reappraisal year. However, N.C. Gen. Stat. § 105-287 (1995) gives the Commission the authority to change the appraised value of real property in a non-reappraisal year under certain enumerated circumstances. The Commission's [Second] Final Decision found that "[t]he extent of the contamination affecting the property was not known to either the County or the Taxpayer as of 1 January 1988 [the date of the last regular appraisal], but was known as of 1 January 1990." We agree with the Commission's conclusion that this fact justified a non-reappraisal year valuation.

On 22 January 1991, the Board heard Camel City's request to review the \$639,000 assessed tax value of the property and unanimously decided to make no change. Camel City appealed this decision to the North Carolina Property Tax Commission (the Commission). On 12 November 1992, the Commission, sitting as the State Board of Equalization and Review, heard Camel City's appeal of the Forsyth County Board's decision. On 23 April 1993, the Commission rendered its Final Decision, assigning a value of \$125,000 to the property for the year 1990. The County appealed to this Court.

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

On 5 July 1994, the Court of Appeals issued its opinion reversing and remanding the Commission's Final Decision. *In re Appeal of Camel City Laundry Co.*, 115 N.C. App. 469, 444 S.E.2d 689 (1994) (*Camel City I*). The Court held that in reducing the tax value of the property, the Commission acted improperly by relying upon factors concerning the contamination of the property "without linking them to the price a buyer would pay for the property, which is the statutorily-required measure of true value." *Id.* at 472-73, 444 S.E.2d at 691. Concluding that the Commission's Decision exceeded its statutorily mandated authority and was unsupported by competent evidence, the Court reversed and remanded "so that the Commission [could] consider appropriate evidence of the property's true value as defined by N.C. Gen. Stat. § 105-283." *Id.* at 473, 444 S.E.2d at 692.

Upon remand, the Commission held a further hearing on Camel City's appeal of the Forsyth County Board's decision of January 1991. The Commission received additional evidence from both parties. On 24 January 1995, the Commission issued its [Second] Final Decision, reducing the tax value of the subject property from \$639,000 to \$430,872. It is this Decision which is the subject of Camel City's present appeal.

The standards for judicial review of decisions of the North Carolina Property Tax Commission are set forth in N.C. Gen. Stat. § 105-345.2(b) (1995). Under this section, the appellate court is to decide all relevant questions of law and interpret constitutional and statutory provisions to determine whether the Commission's decision is lawful. *MAO/Pines v. New Hanover County Bd. of Equalization*, 116 N.C. App. 551, 556, 449 S.E.2d 196, 199 (1994). In conducting its review, this Court must consider "the whole record" and take "due account . . . of the rule of prejudicial error." *Id.* at 556, 449 S.E.2d at 199-200. However, this Court may not reweigh the evidence or substitute its own evaluation of the evidence for that of the Commission. *Id.* at 556, 449 S.E.2d at 200 (*citing In re McElwee*, 304 N.C. 68, 75, 283 S.E.2d 115, 120 (1981)).

N.C. Gen. Stat. § 105-283 (1995) provides that "[a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money." The statute defines "true value" as

market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

compulsion to buy or sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id. In determining the true value of property, the person making the appraisal must also consider “any other factors that may affect its value.” N.C. Gen. Stat. § 105-317(a)(1) (1995) (factors to be considered in determining “true value of land”); N.C. Gen. Stat. § 105-317(a)(2) (1995) (factors to be considered in determining “true value of a building or other improvement”). The Commission shall “‘determine the weight and sufficiency of the evidence and the credibility of the witnesses, . . . draw inferences from the facts, and . . . appraise conflicting and circumstantial evidence.’” *MAO/Pines*, 116 N.C. App. at 556, 449 S.E.2d at 199 (*quoting McElwee*, 304 N.C. at 87, 283 S.E.2d at 126-27).

It is well-settled in North Carolina that a county’s ad valorem tax assessments are presumed to be correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). However, a taxpayer may rebut this presumption by producing “‘competent, material and substantial’ evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.” *Id.* at 563, 215 S.E.2d at 762 (citation omitted) (emphasis in original).

Camel City makes two arguments before this Court: (1) that the Commission “erred and exceeded its statutory authority by not valuing the property at its true value in money as of January 1, 1990,” and (2) that the Commission erred in concluding that the cost to clean up the contamination should be discounted to the end of the useful life of the building located on the property.

A clear understanding of the respective positions of the parties as to the true value of the subject property is essential to a proper resolution of Camel City’s contentions. We therefore briefly summarize the evidence of value offered by each party.

At the first hearing before the Commission, Camel City stipulated that \$639,000 did not exceed the unimpaired value of the subject property. At that hearing, Camel City’s expert appraisal witness, John McCracken, did not express an opinion as to the impaired value of the property for any year. However, Camel City did present evidence that

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

(1) the property is contaminated; (2) the cost of remediation (cleanup) is estimated to be in excess of \$500,000; (3) there have been no sales of severely contaminated property; (4) Camel City has ceased using the property as a laundry and dry-cleaning facility; and (5) Camel City has tried unsuccessfully to sell or lease the property.

[2] At the further hearing, following this Court's mandate in *Camel City I*, the Commission allowed Camel City to offer additional evidence of the true value in money of the property. The County objected, and the Commission continued the hearing to allow the County to respond to Camel City's evidence. The County then elected to offer its own additional evidence of the true value of the property. Thus, the County cannot now be heard to complain about the receipt of Camel City's additional evidence of value, and we reject the County's argument on appeal (erroneously denominated a "cross-assignment of error") that the Commission erred in receiving such evidence.

[3] At the second hearing, Mr. McCracken again testified for Camel City and expressed his opinion that the market value of the property is \$0. Mr. McCracken testified that he arrived at his appraisal of the unimpaired value of the property using both the cost method and the income method of valuation. He determined the unimpaired value to be \$505,000. He then determined the present value of the future remediation costs, which he estimated at \$584,000 as of the date of valuation. Subtracting the present value of remediation costs from the unimpaired value of the property, Mr. McCracken concluded that the impaired value of the property was -\$79,000 as of 1 January 1990.

The County's position at the first hearing was that the tax value of the property was unaffected by the contamination. However, at the further hearing, the County adjusted its appraisal, presumably in response to the following language from *Camel City I*:

The Machinery Act does not provide for consideration of property's income-producing ability nor for the cost to conduct environmental remediation on the property in determining property value. This is not to say that these factors do not play a part in the value of the property. No doubt a buyer would take them into account when deciding upon a price to offer for the property.

Camel City I, 115 N.C. App. at 472, 444 S.E.2d at 691. The County maintained its original position that the unimpaired value of the property was \$639,000, but then calculated an impaired value to account

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

for the contamination. In arriving at this impaired value, the County's expert appraiser, John Potter, applied the income approach "value in use" method of valuation. Using a 15.1% capitalization rate which included an additional risk factor of 4% for stigma and non-liquidity, Mr. Potter arrived at an indicated capitalized value of \$477,020. Assuming that the useful life of the building on the property was 25 years, Mr. Potter then amortized an estimated \$500,000 in remediation costs over that period, resulting in an indicated present value of remediation costs of \$46,148. Subtracting the present value of remediation costs from the indicated capitalized value, Mr. Potter arrived at a "value in use" of \$430,872. This value was ultimately adopted by the Commission.

Camel City concedes that where a sales approach to valuation is impractical due to the unavailability of data on comparable sales, other methods of valuation, including the income approach, are acceptable in determining fair market value for tax purposes. *See, e.g., In re Southern Railway*, 313 N.C. 177, 185, 328 S.E.2d 235, 241 (1985). However, Camel City argues that under any approach to arriving at market value, the valuation must be conducted from the standpoint of a willing buyer. *Id.* at 188, 328 S.E.2d at 243; *see also Camel City I*, 115 N.C. App. at 472-73, 444 S.E.2d at 691. Camel City contends that the County's method of valuation is fatally flawed because it fails to acknowledge the lack of willing buyers of the subject property.

We cannot accept Camel City's argument that its property has no value for tax purposes simply because Camel City has been unable to find a buyer for the property. As we have noted, "true value in money" is defined by statute as the price a *willing buyer* would pay a willing seller for the property where neither is obligated to buy or sell. N.C. Gen. Stat. § 105-283 (1995). "The willing buyer, however, is a hypothetical one in a hypothetical sale." *Inmar Associates, Inc. v. Borough of Carlstadt*, 518 A.2d 1110, 1114 (N.J. Super. Ct. App. Div. 1986) (decided under statute substantially similar to N.C. Gen. Stat. § 105-283), *affirmed in part, reversed in part on other grounds*, 549 A.2d 38 (N.J. 1988). Thus, Camel City's failure to successfully market the subject property does not dictate an ad valorem tax value of \$0.

Moreover, the present and potential future use of the subject property dispel the notion that the property has no value for tax purposes. The evidence shows that the building located on the property is in fair condition and is capable of producing rental income. The

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

contamination does not affect the building or surrounding parking lot and presents no health hazard to people occupying the building. There is no indication that the contamination could not be satisfactorily cleaned up, either prior to sale or after sale, if a clean-up is eventually mandated. We can find no basis for assigning a tax value of \$0 to this property when the contamination does not prevent the present or future owners from putting the property to its highest and best use. *See In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 473, 458 S.E.2d 921, 923 (1995) (important factor in determining market value is property's highest and best use), *affirmed*, 342 N.C. 890, 467 S.E.2d 242 (1996). *See also Boekeloo v. Board of Review*, 529 N.W.2d 275, 278 (Ia. 1995) (where evidence showed that contaminated property could be remediated and that plaintiff taxpayers were using the property for its intended purpose, plaintiffs' failure to obtain bids for remediation represented voluntary decision to remove property from market which could not form basis for assigning nominal tax value to property).

Of course, the contamination and the cost of remediation are factors to be considered in determining the price that the hypothetical willing buyer would pay for the subject property, and a valid appraisal would take these factors into account. Here, the County's expert appraiser did account for these factors by discounting the unimpaired value of the property for "stigma and non-liquidity" and by deducting the amortized cost of remediation.

This brings us to Camel City's contention that the Commission erred by amortizing the cost of remediating the property over the useful life of the building. The County presented evidence that the property was on the federal Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS) list, meaning that it was identified as a possible priority site for remediation. However, as of the date of the hearing, Camel City had not been ordered to clean up the property, and it was not known if Camel City would ever be required to do so. Furthermore, there was no evidence that the subsoil contamination affected the use of the building or the parking lot. The County's expert appraiser, Mr. Potter, testified that he considered these facts in arriving at his estimate of the tax value of the subject property.

Mr. Potter testified that he valued the subject property using the income approach "value in use" method as recommended by the "Standard on the Valuation of Property Affected by Environmental

IN RE APPEAL OF CAMEL CITY LAUNDRY CO.

[123 N.C. App. 210 (1996)]

Contamination,” published in 1992 by the International Association of Assessing Officers (hereinafter IAAO Standard). Mr. Potter’s report, placed in evidence by the County, cited Clause 4.1 of the IAAO Standard, which states that with respect to contaminated property,

[t]here is a tendency to discount [the unencumbered] value based on costs related to remediating or isolating the environmental contamination. Fully deducting the costs may overstate the decline in value, because the value in use concept would then be ignored. *Value in use suggests that a property which is still in use, or which can be used in the near future, has a value to the owner.* This would be true even if costs to cure environmental problems exceed the nominal, unencumbered value.

IAAO Standard, *supra*, Clause 4.1 (emphasis added). Mr. Potter’s report further stated that according to Clause 4.2 of the IAAO Standard, even when clean-up costs are incurred, property may be able to maintain an income stream, so that “costs may be amortized over a longer period. This will increase debt, but not affect present worth on a dollar for dollar basis. *Costs may often be amortized over expected improvement life, and the present worth of the costs computed.*” IAAO Standard, *supra*, Clause 4.2 (emphasis added). Finally, the report cited Clause 8.1 of the IAAO Standard, which states that “[i]f some use exists, value must exist; property should be valued as if uncontaminated, and the present worth of amortized costs, which do not increase future efficiency and value, should be deducted.” IAAO Standard, *supra*, Clause 8.1.

The Commission found that “[t]he County properly applied the income approach ‘value in use’ method and arrived at an indicated capitalized value of \$477,020[,] using a 15.1 percent capitalization rate which included an additional risk factor of 4 percent for stigma and non-liquidity. . . .” The Commission further found that the useful life of the building is 25 years and that “[t]he remediation cost of \$500,000 was properly amortized” over that period, “resulting in an indicated present value of remediation cost of \$46,148. . . .” We are of the opinion that the County’s evidence, including Mr. Potter’s report and the IAAO Standard cited therein, amply supported the above findings.

In sum, the Commission was presented with two vastly different estimates of the tax value of the subject property: the \$0 value presented by Camel City’s expert, and the \$430,872 value presented by the County’s expert. The function of determining the weight and sufficiency of the evidence and the credibility of the expert witnesses

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

presented by the parties belonged exclusively to the Commission. *MAO/Pines*, 116 N.C. App. at 556, 449 S.E.2d at 199. Apparently placing greater weight on the County's income-approach "value in use" method of valuing the subject property, the Commission concluded that the County properly considered the effects of the contamination in its appraisal of the "true value in money" of the property. Camel City has not shown that the County's method of valuing the property was illegal or arbitrary or that the County's assessment exceeded the true value in money of the property. We hold that the Commission acted within its authority in valuing the property at \$430,872 and that this value was supported by competent, material and substantial evidence. The decision of the Commission is therefore

Affirmed.

Judges JOHN and McGEE concur.

RONALD L. JOHNSON, PLAINTIFF, v. JONES GROUP, INC., DEFENDANT-EMPLOYER, AND
AETNA LIFE AND CASUALTY CO., DEFENDANT-CARRIER

No. COA94-1311

(Filed 16 July 1996)

Workers' Compensation § 296 (NCI4th)— ability of claimant to make rational decisions—failure to accept treatment—findings required of Commission

In cases where the ability of a claimant to make rational decisions regarding his or her welfare is at issue, the Industrial Commission must make findings regarding the claimant's ability to act as a "reasonable person" in weighing medical options and making treatment decisions before denying benefits under N.C.G.S. § 97-25; accordingly, when encountering a claimant defending failure to accept treatment by denial of the ability to make rational decisions in that regard, the Commission, in order to bar compensation under N.C.G.S. § 97-25, must record findings that the claimant possessed the ability to think and act as a reasonable person and, notwithstanding, willfully rebuked defendants' treatment efforts.

Am Jur 2d, Workers' Compensation §§ 389, 390.

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

Workers' compensation: reasonableness of employee's refusal of medical services tendered by employer. 72 ALR4th 905.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of workers' compensation. 3 ALR5th 907.

Appeal by plaintiff from Opinion and Award entered 7 June 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 September 1995.

Shyllon & Shyllon, by Prince E.N. Shyllon, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, for defendant appellees.

JOHN, Judge.

Plaintiff appeals denial by the North Carolina Industrial Commission (the Commission) of workers' compensation benefits based upon his "unjustifiab[le] refus[al] to cooperate with defendants' rehabilitative efforts despite order of the Industrial Commission." We find certain of plaintiff's arguments persuasive and vacate the order of the Commission.

Pertinent facts and procedural information are as follows: On 20 March 1991, plaintiff fell fifty feet down an elevator shaft and suffered a catastrophic closed head injury while working as a carpenter for defendant employer. Plaintiff initially received treatment in the acute care unit at Wake Medical Center and was transferred 25 April 1991 to Wake Rehabilitation Hospital. On 20 June 1991, plaintiff was admitted to Carolina Re-Entry/Learning Services (Learning Services), an inpatient facility at which he was treated by a multi-disciplinary team, including a social worker, a neuropsychologist, and physical, occupational, and speech therapists. Plaintiff's "graduation" date from Learning Services was to be 30 November 1991.

Plaintiff, however, became increasingly non-compliant with the plan of treatment and ultimately left Learning Services on or about 24 October 1991. After issuing a written warning to plaintiff that continued benefits were contingent upon his pursuing prescribed medical treatment, the Commission approved defendants' Form 24 application to terminate benefits 9 December 1991. Defendants continued to

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

pay for plaintiff's medical treatment while he lived in North Carolina, and he was evaluated by Drs. Baldwin, O'Brien, and Comer in the months succeeding his departure from Learning Services.

In February 1992, plaintiff took up residence with his parents in Poughkeepsie, New York. According to plaintiff's mother, he became hostile and threatening while in New York, and was admitted to the mental health unit of Saint Francis Hospital in Poughkeepsie for two weeks in August 1992. The most recent documentation in the record reflects treatment of plaintiff in October 1992 by Dr. Silverman at the Veterans Administration hospital in Montrose, New York, for "organic brain syndrome [secondary] to closed head trauma."

A hearing regarding termination of plaintiff's benefits was held 29 October 1992 before Deputy Commissioner Tamara R. Nance. Further benefits were denied to plaintiff "until such time as his unjustifiable refusal to participate in rehabilitation and treatment directed by defendants, ceases." Upon appeal, the Commission upheld the decision of the Deputy Commissioner in an Opinion and Award (the Opinion) which concluded:

Plaintiff unjustifiably refused to cooperate with defendants' rehabilitative efforts despite order of the Industrial Commission. Pursuant to G.S. § 97-25, his refusal shall bar him from further compensation until such refusal ceases. Moreover, because the circumstances in this case did not justify plaintiff's refusal, no compensation shall be paid for the period of suspension, even should plaintiff now agree to participate in rehabilitation.

Plaintiff filed timely notice of appeal to this Court.

N.C.G.S. § 97-25 (1991), cited by the Commission, states in pertinent part:

Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

....

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

"Refusal" is defined in Black's Law Dictionary 1282 (6th ed. 1990) as:

[T]he declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey. . . . [T]he word is often coupled with "neglect," as if a party shall "neglect or refuse" to pay a tax, file an official bond, obey an order of court, etc. But "neglect" signifies a mere omission of a duty, which may happen through inattention, dilatoriness, mistake, or inability to perform, while "refusal" implies the positive denial of an application or command, or at least a mental determination not to comply.

Furthermore, "refuse" is defined by Black's, *supra*, in part as follows:

"Fail" is distinguished from "refuse" in that "refuse" involves an act of the will, while "fail" may be an act of inevitable necessity.

See also Schofield v. Tea Co., 299 N.C. 582, 588, 264 S.E.2d 56, 61 (1980) ("failure" in G.S. § 97-25 provision regarding employer's "failure" to provide medical care distinguished from employer's "wilful refusal"). Hence "refusal" as employed in the statute connotes a willful or intentional act.

Plaintiff contends he did not "refuse" to cooperate with defendants' rehabilitation plan, because his personality and mental and cognitive abilities were so fundamentally altered as a result of the 20 March 1991 brain injury that he was reduced to an uncooperative and unmotivated state. He claims he should not be "punished" due to a status over which he has no control.

In response, defendants first insist the Commission's decision should be upheld because "there is no evidence that the plaintiff's refusal to participate in the Learning Services program was anything but a voluntary, conscious decision on his part." Defendants' contention to the contrary, the record is replete with evaluations by numerous professionals who diagnosed deficits in plaintiff's cognitive functioning.

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

In a report filed 24 September 1991, for example, Learning Services personnel found that:

Ronald . . . has demonstrated variable motivation to participate in treatment and decreased insight in regard to the nature of his deficits.

A follow-up assessment by Learning Services dated 24 October 1991 indicated that plaintiff:

has no physical difficulties but cognitive deficits prevent accurate completion of work tasks. He has much difficulty with problem solving, and attention and concentration which results in poor work quality. Ron also has much difficulty in accepting supervision and responding to feedback. He makes the same mistakes repeatedly and has not demonstrated the ability to learn from prior mistakes over a period of several weeks. . . . He is easily distracted by others and their activities in the work environment.

As the result of a 29 January 1992 examination by Dr. O'Brien, who had treated plaintiff while an in-patient at Wake Rehabilitation Hospital, the physician noted, "He has diminished initiative and limited insight into his present deficits." After a 3 March 1992 appointment, Dr. O'Brien opined:

He is still functioning at a borderline range, with a verbal IQ of 72 and a performance IQ of 75. He has significant difficulties with memory and with initiation.

Further, Dr. Comer, a psychiatrist who evaluated plaintiff in December 1991 and several times thereafter, testified at deposition:

[After plaintiff's initial visit,] I followed him over the next several months, and he never improved. . . . He didn't want to come back, didn't want to be here, and generally seemed to lack any motivation, any insight into his difficulties. . . . [A]s time progressed [] it became clear that . . . he was limited, not only by the injury to his cognitive and intellectual abilities, but he was more so disabled by the brain injuries resulting in a lack of motivation, a low frustration tolerance and the personality change with irritability and withdrawal and a lack of ability to relate well to other people; that all of that combined made it impossible, really, for him to make the kind of progress he'd have to make to be able to even wish to go to work; that, in a sense, this kind of brain injury injured his motivational system as much as anything else.

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

When asked if he had any knowledge as to why plaintiff had not been able to complete the Learning Services program, Dr. Comer replied:

Yes. He didn't want to. As long as he didn't want to—he doesn't have enough frustration tolerance to be able to complete anything he doesn't want to do. He's like a two- or three-year-old child in terms of that function.

Finally, the following impression of plaintiff's condition was noted in the 14 August 1992 discharge summary prepared at St. Francis Hospital:

Cognitive functioning was grossly impaired. . . . Pre-morbid personality prior to trauma was reportedly within normal limits. The patient does not appear to understand the reason for his hospitalization. Judgement [*sic*] was impaired, insight into his illness was nil. . . . He demonstrates affective instability and alleged recurrent outbursts of aggression and threats toward mother. Also markedly impaired social judgement [*sic*], marked apathy, indifference and paranoid ideation. This persistent personality disturbance represents a change from a previously normal state of functioning due to head trauma as demonstrated by MRI. Because of structural damage to the brain this disorder will tend to persist.

In further response to plaintiff's contention, defendants cite *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990), asserting it furnishes conclusive support for the Commission's determination. We are persuaded otherwise.

In *Watkins*, a workers' compensation claimant who declined to undergo back surgery recommended by her orthopaedic surgeon was denied further benefits based upon G.S. § 97-25. Quoting *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 290, 229 S.E.2d 325, 329 (1976), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977), this Court observed:

The general rule is that where the surgery is of serious magnitude and risk, involves much pain and suffering and is of uncertain benefit, the refusal of the claimant to undergo surgery is reasonable and will not prejudice his claim.

Watkins, 99 N.C. App. at 304, 392 S.E.2d at 756. We then held the Commission had properly ruled

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

"[t]hat the surgery recommended by plaintiff's physician ha[d] a high probability of significantly reducing the period of plaintiff's disability and would [have been] sought by a similarly situated reasonable man."

Id. at 306, 392 S.E.2d at 757.

In their brief, defendants make the following argument that the standard set forth in *Watkins* is controlling:

Applying an objective, reasonableness standard as required by the *Watkins* case to the facts of the instant case, it is clear that the plaintiff's refusal to participate in the Learning Services program and in the other efforts to rehabilitate him was unreasonable and unjustified. The fact is that the rehabilitation programs in which the plaintiff was enrolled did *not* involve surgery, they were not of a serious magnitude and risk to the plaintiff's health and safety, they did not cause him any pain or suffering and the programs were only going to inure to the plaintiff's benefit in the long run. Any reasonable person would have participated in the program.

We agree *Watkins* sets forth a "reasonableness" test to the decision of whether to deny benefits to a claimant refusing treatment, *i.e.*, an analysis of whether a reasonable person who is motivated to improve his or her health would accept the proffered treatment. However, the question remains whether such a test is appropriate in circumstances involving a claimant who, due to mental and cognitive impairments, may not qualify as a "reasonable person." See *Jackson v. City of Gretna*, 376 So.2d 612, 614 (La. Ct. App. 1979) (in view of claimant's "very limited mental ability," his failure to understand importance of rehabilitative exercise and his lack of self-discipline in performing exercises on a consistent basis "do not necessarily constitute intentional disobedience or willfulness," but rather "are more probably the natural result of gross ignorance;" claimant not denied benefits for failure to cooperate with rehabilitative program).

In cases where the ability of a claimant to make rational decisions regarding his or her welfare is at issue (and, we emphasize, *only* in such cases), we believe the Commission must make findings regarding the claimant's ability to act as a "reasonable person" in weighing medical options and making treatment decisions before denying benefits under G.S. § 97-25. Accordingly, when encountering a claimant defending failure to accept treatment by denial of the ability to make

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

rational decisions in that regard, the Commission, in order to bar compensation under G.S. § 97-25, must record findings that the claimant possessed the ability to think and act as a reasonable person and, notwithstanding, willfully rebuked defendants' treatment efforts. If the claimant is found to have willfully refused treatment, then the Commission may go on to determine if "the circumstances justified the refusal," G.S. § 97-25, such that a reasonable person might have declined the proffered treatment. *See Watkins*, 99 N.C. App. at 305, 392 S.E.2d at 757.

The foregoing interpretation of G.S. § 97-25 comports with the avowed purpose of the Workers' Compensation Act.

It must be remembered the Workmen's [now Workers'] Compensation Act requires the Industrial Commission and the courts to construe the compensation act liberally in favor of the injured workman. . . . The philosophy which supports the Workmen's Compensation Act is that the wear and tear of the workman, as well as the machinery, shall be charged to the industry.

Porterfield v. RPC Corp., 47 N.C. App. 140, 143-144, 266 S.E.2d 760, 762 (1980) (quoting *Cates v. Construction Co.*, 267 N.C. 560, 563, 148 S.E.2d 604, 607 (1966)). If "wear and tear" of a worker includes brain damage to the extent he becomes incapable of cooperating with rehabilitation efforts, the policy of liberality in favor of that injured worker precludes denial of benefits based upon his "failure" to accept, as opposed to willful "refusal" of, such treatment. We observe instances of this type likely will occur relatively infrequently, and the consequent burden on industry to absorb such claims thus will not be substantial.

Turning to the case *sub judice*, we conclude the Commission's Opinion fails to reflect it considered evidence of plaintiff's lack of cognitive ability prior to ruling he "unjustifiably refused to cooperate with defendants' rehabilitative efforts." Rather, the Commission appears to have focused upon whether the treatment proffered by defendants was beneficial, such that a "reasonable person" would not have refused it.

For example, the Opinion sets forth in detail the treatment philosophy and methods employed at Learning Services, and contains the observation that the Commission could not "conceive of a better program to assist individuals with brain injuries to gradually reenter

JOHNSON v. JONES GROUP, INC.

[123 N.C. App. 219 (1996)]

the community and again become functional.” In addition, the Opinion emphasizes that all health professionals encountered by plaintiff agree he is in need of additional rehabilitation. Such observations, however, do not address the issue of plaintiff’s ability to cooperate with efforts to rehabilitate him.

We also observe the Opinion concludes with a recommendation that plaintiff be appointed a guardian. To qualify for appointment of a guardian in this state, an adult must be found “incompetent”, *i.e.*, to

lack[] sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, . . . disease, injury, or similar cause or condition.

N.C.G.S. § 35A-1101(7) (1995); N.C.G.S. § 35A-1112 (1995).

Thus, on the one hand, the Commission intimates a concern that plaintiff lacks the capability to make decisions concerning his welfare, yet fails on the other to express its consideration of the effect of that want of capacity upon plaintiff’s failure to comply with treatment.

In sum, recognizing the axiom that it is not the province of this Court to weigh the evidence or find facts, we vacate the Commission’s denial of benefits to plaintiff and remand this matter for further findings and subsequent order consistent with the opinion herein. *See Wood v. Stevens & Co.*, 297 N.C. 636, 640, 256 S.E.2d 692, 695 (1979) (if Commission’s findings of fact insufficient to enable Court to determine parties’ rights, case must be remanded for further findings in light of legal principles enunciated in Court’s opinion).

We note in conclusion plaintiff argues in his reply brief that the Form 24 application approved by the Commission was legally insufficient to terminate plaintiff’s benefits. This argument is not contained in plaintiff’s assignments of error in the record on appeal, and we decline to address it. *See* N.C.R. App. P. 10(a) (“the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal”).

Vacated and remanded.

Judges MARTIN, John C. and McGEE concur.

SEAGROVES v. AUSTIN CO. OF GREENSBORO

[123 N.C. App. 228 (1996)]

CHERYL D. SEAGRAVES, PLAINTIFF-EMPLOYEE, v. THE AUSTIN COMPANY OF GREENSBORO, DEFENDANT-EMPLOYER, (SELF-INSURED KEY RISK MANAGEMENT SERVICES)

No. COA95-853

(Filed 16 July 1996)

Workers' Compensation § 297 (NCI4th)—compensable injury—light duty employment—discharge for misconduct—effect on benefits

Where an employee, who has sustained a compensable injury and has been provided light duty or rehabilitative employment, is terminated from such employment for misconduct unrelated to the compensable injury or other fault on the part of the employee, such termination does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving benefits for temporary partial or total disability pursuant to N.C.G.S. § 97-32; rather, the test is whether the employee's loss of or diminution in wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work related disability, in which case the employee will be entitled to benefits for such disability.

Am Jur 2d, Workers' Compensation §§ 444, 445.

Appeal by defendant from the opinion and award entered 17 May 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 March 1996.

Franklin Smith for plaintiff-appellee.

Tuggle Duggins & Meschan, P.A., by Elizabeth G. Grimes and J. Reed Johnston, Jr., for defendant-appellant.

MARTIN, John C., Judge.

Defendant-employer appeals from an opinion and award of the North Carolina Industrial Commission awarding plaintiff benefits for temporary total disability. The record establishes that in 1992, plaintiff developed bilateral carpal tunnel syndrome and associated right tardy ulnar nerve palsy in connection with her employment as an assembly line worker at defendant-employer's plant in Yadkinville, North Carolina. Plaintiff underwent multiple corrective surgical pro-

SEAGROVES v. AUSTIN CO. OF GREENSBORO

[123 N.C. App. 228 (1996)]

cedures during the period from June 1992 until May 1993. Defendant, who was self-insured, accepted liability for plaintiff's occupational disease and plaintiff received benefits for temporary disability.

In July 1993, plaintiff was permitted by her physician to return to light duty work with defendant, and light duty work was provided to her in the form of a non-production job making boxes. On 9 August 1993, however, defendant terminated plaintiff's employment for alleged gross misconduct arising out of an incident in which plaintiff briefly exposed her buttocks to two female co-employees during horseplay at the workplace.

After her termination, plaintiff continued to experience difficulties with her hands and was seen by Dr. Andrew Koman at the Wake Forest University Hand Center in November 1993. On 8 February 1994, Dr. Koman performed additional right carpal tunnel release surgery. Defendant paid plaintiff benefits for temporary total disability from 8 February 1994 until 13 July 1994, when she reached maximum medical improvement. In Dr. Koman's opinion, plaintiff retains ten and twenty percent permanent partial disabilities to her left and right hands, respectively, and is able to engage only in light duty work not requiring repetitive hand motion or lifting in excess of ten pounds. According to plaintiff, she has been unsuccessful in finding other suitable employment since her discharge. Defendant ceased making payments to plaintiff for temporary total disability on 13 July 1994, contending plaintiff's termination for misconduct amounted to a constructive refusal by her to accept suitable light duty work offered her and a forfeiture of her right to compensation under G.S. § 97-32.

Declining to decide whether plaintiff's conduct constituted cause for defendant to terminate her employment, the deputy commissioner found that such conduct was, in any event, not tantamount to a refusal to accept suitable light work. He concluded, in the absence of such light duty work and because she retained permanent partial disabilities in both hands, that plaintiff remained totally disabled and awarded her benefits for temporary total disability from 9 August 1993, the date of her termination by defendant, to 8 February 1994, the date of her surgery, and from 13 July 1994 and continuing for the period of her disability. Defendant appealed to the Full Commission. While the appeal to the Full Commission was pending, defendant moved, pursuant to Rule 701(7) of the Workers' Compensation Rules, for a new hearing to take additional evidence on the issue of plain-

SEAGROVES v. AUSTIN CO. OF GREENSBORO

[123 N.C. App. 228 (1996)]

tiff's disability, supported by an affidavit tending to show that plaintiff had been employed at a nursing home from 21 November 1994 to 27 December 1994.

The Full Commission entered its opinion and award finding that defendant had not shown good grounds to take further evidence, adopting the findings made by the deputy commissioner, and awarding plaintiff benefits for temporary total disability from 9 August 1993 and continuing for as long as plaintiff remains totally disabled, subject to a credit for benefits paid from 8 February 1994 to 13 July 1994, and reasonable and necessary medical expenses.

G.S. § 97-32 provides:

If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

The primary question presented by this appeal is whether an employee, who is disabled as a result of a compensable injury and is provided with light duty employment by the employer, constructively refuses the light duty work and forfeits workers' compensation benefits for such disability pursuant to the statute upon termination of the employment for fault or misconduct unrelated to the compensable injury. The question is apparently one of first impression in North Carolina.

Courts in other jurisdictions have approached the issue in divergent ways. On one hand, it has been held that a disabled employee who can perform the light duty work provided by his or her employer, yet is fired for conduct that would normally result in the termination of a nondisabled employee and that in no way is connected with the disability, is in actuality refusing to perform the work, and is barred, *ipso facto*, from receiving any further disability benefits. *Calvert v. General Motors Corp., Buick Motor Div.*, 120 Mich. App. 635, 327 N.W.2d 542 (1982). Defendant advocates that we adopt such a rule in North Carolina by holding that plaintiff's discharge for misconduct amounted to an unjustified constructive refusal to work and a forfeiture of benefits under G.S. § 97-32.

In *Calvert*, the disabled employee, who had returned to "favored" work at General Motors after sustaining a work-related injury, was

SEAGROVES v. AUSTIN CO. OF GREENSBORO

[123 N.C. App. 228 (1996)]

discharged for violating a company rule against possession of weapons on company premises. The Workers' Compensation Appeals Board awarded a resumption of compensation on the ground that the employee's act of carrying an unloaded pistol in her purse, while a "criminally serious" act, did not involve moral turpitude and did not disrupt the workplace.

The Michigan Court of Appeals reversed the Board, holding that even though the employee's conduct was not morally turpitudinous, it was preventable misconduct for which any employee would have been discharged. *Id.* at 643, 327 N.W.2d at 546. The Court quoted from its prior decision in *Porter v. Ford Motor Co.*, 109 Mich. App. 728, 732, 311 N.W.2d 458, 460 (1981):

"If defendant can show that plaintiff was fired for violation of company rules which would normally result in termination of a nondisabled employee, and that the violation was not caused by plaintiff's disability, the benefits may be properly denied.

By establishing the second prong of this test, both parties are protected. The employee is guarded against termination or harassment leading to voluntary termination as a pretext to denial of benefits. The employer is insulated against unacceptable behavior which normally would result in termination of other employees. A disabled employee who can perform that favored work, yet violates company rules to the extent that discharge is justified, in actuality is refusing to perform the favored work and thus creating a bar to compensation . . . [citation omitted]."

Therefore, the Court concluded, plaintiff's conduct in carrying a concealed weapon was "just cause" for the employee's discharge, barring her from receiving further compensation. *Id.* at 643-44, 327 N.W.2d at 546-47.

Courts in other jurisdictions, however, have taken a somewhat different approach and held that an employee's discharge from light duty work for misconduct unrelated to his or her disability does not automatically bar the employee from receiving disability benefits. To these courts, the simple fact of termination for misconduct is not the sole dispositive factor in determining eligibility for benefits.

For example, in *Marsolek v. George A. Hormel Co.*, 438 N.W.2d 922 (Minn. 1989), a disabled employee, who had returned to lighter

SEAGROVES v. AUSTIN CO. OF GREENSBORO

[123 N.C. App. 228 (1996)]

duty “rehabilitation” work after sustaining several different work-related injuries, was discharged when he was videotaped at a picket line during a union strike threatening to damage cars and injure employees attempting to cross the picket line. The employee filed for workers’ compensation benefits, including wage loss benefits. The compensation judge determined that the discharge for misconduct was irrelevant and awarded temporary total disability benefits. The Workers’ Compensation Court of Appeals reversed the award, and the employee petitioned for writ of certiorari to the Supreme Court of Minnesota.

The Minnesota Supreme Court affirmed in part and reversed in part the order of the Workers’ Compensation Court of Appeals, and remanded the case to the compensation judge. Noting that the primary purpose of workers’ compensation is to compensate injured workers for wage loss attributable to a work injury, the Court stated:

[W]e now hold that a justifiable discharge for misconduct suspends an injured employee’s right to wage loss benefits; but the suspension of entitlement to loss benefits will be lifted once it has become demonstrable that the employee’s work-related disability is the cause of the employee’s inability to find or hold new employment. Such a determination should be made upon consideration of the totality of the circumstances including the usual work search “requirements.”

Id. at 924.

Similarly, in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995), the employee was terminated for misconduct on the same day that he sustained a work-related injury. He filed a workers’ compensation claim seeking an award of temporary total disability benefits, and an administrative judge held the employer liable for temporary total disability benefits under Colorado’s workers’ compensation act.

On appeal to the Colorado Supreme Court, the employer argued that the employee should not be eligible for temporary total disability benefits because he was terminated for fault. The Court disagreed, holding in effect that “an employee sustaining a work-related injury who is subsequently terminated for fault from the employment out of which the injury arose prior to reaching maximum medical improvement is not automatically barred from temporary total disability benefits.” *Id.* at 547. The Court explained, after reviewing the statutory

SEAGROVES v. AUSTIN CO. OF GREENSBORO

[123 N.C. App. 228 (1996)]

scheme with regard to an injured employee's right to disability benefits and recognizing that the workers' compensation act, is not, as a general proposition, based upon principles of fault, that when an employee suffers a work-related injury and is subsequently terminated from the employment during which the injury occurs, an initial determination must be made as to whether the termination was for fault. *Id.* at 548-49. The Court stated that the burden of proving the employee's termination was for fault is upon the employer, and if the employer can satisfy this burden, then it is the responsibility of the employee to establish that his work-related injury contributed to his subsequent wage loss. *Id.* at 549.

As long as limitations resulting from an industrial injury contribute to a claimant's inability to secure employment at pre-injury wage levels, compensation benefits are payable for loss of earning capacity. If, on the other hand, the injury and its sequelae play no part in the worker's inability to find suitable employment, there is no compensable loss of earning capacity We do not seek to encourage misconduct by seeming to reward it [but] we fail to see the wisdom in holding that an employee who loses a post-injury job because of misconduct voluntarily forfeits benefits for a loss of earning capacity which, depending on the nature and extent of disability, may be quite profound . . . [citations omitted].

Id. at 548. The Court remanded the case to the administrative judge since no determination had been made with respect to whether the employee was terminated for fault or whether his injury contributed in part to his subsequent wage loss. *Id.*

We believe the latter approach, as opposed to that advocated by defendant, more closely comports with the underlying purpose of North Carolina's Workers' Compensation Act to provide compensation to workers whose earning capacity is diminished or destroyed by injury arising from their employment, *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E.2d 865 (1943), and the liberal construction which has long been accorded its provisions. *Thomas v. Gas Co.*, 218 N.C. 429, 11 S.E.2d 297 (1940). Accordingly, we hold that where an employee, who has sustained a compensable injury and has been provided light duty or rehabilitative employment, is terminated from such employment for misconduct or other fault on the part of the employee, such termination does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving ben-

SEAGROVES v. AUSTIN CO. OF GREENSBORO

[123 N.C. App. 228 (1996)]

efits for temporary partial or total disability. Rather, the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability. Therefore, in such cases the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability. The application of this rule will, we believe, best achieve fairness to all parties by assuring that an injured employee is awarded benefits for wage loss which is clearly attributable to his or her job-related disability, while protecting employers from liability to employees who engage in intentional, unacceptable conduct while employed in rehabilitative or light duty settings.

In the present case, the Industrial Commission declined to decide the threshold question of whether plaintiff's conduct amounted to misconduct which would have ordinarily resulted in defendant's termination of a nondisabled employee. Moreover, although finding that plaintiff had attempted, prior to her 8 February 1994 surgery, to locate other employment, the Commission made no determination as to plaintiff's ability, after reaching maximum medical improvement on 13 July 1994, to hold employment of any kind and to earn wages, and if she is unable to do so, whether such inability is due to her work-related occupational disease. Thus, we must reverse the Commission's opinion and award and remand this case to the Commission for a determination of these issues and an award in accordance with the rules set forth in this opinion.

In light of our decision, we need not discuss defendant's remaining assignments of error relating to the Commission's refusal to receive additional evidence with respect to whether plaintiff had, in fact, been employed during the period for which she claimed entitlement to benefits for temporary total disability. Evidence with respect to plaintiff's ability to hold employment, and the extent thereof, is

CARTER v. STANLY COUNTY

[123 N.C. App. 235 (1996)]

clearly relevant to the issues which we have remanded for the Commission's consideration.

Reversed and remanded.

Chief Judge ARNOLD and Judge SMITH concur.



JOE CARTER, REBECCA W. CARTER AND CRYSTAL VENTURES CORPORATION, A NORTH CAROLINA CORPORATION V. STANLY COUNTY, A COUNTY IN THE STATE OF NORTH CAROLINA, WILLIAM DWIGHT SMITH, CHAIRMAN OF THE STANLY COUNTY COMMISSIONERS; DONNIE JOE WHITLEY, PAUL EDWARD BOWERS, SR., THOMAS EDWARD UNDERWOOD, MELVIN K. HUNEYCUTT, COUNTY COMMISSIONERS; THE STANLY COUNTY HEALTH DEPARTMENT, JERRY L. BURLESON, J. MICHAEL HATLEY, DR. PAUL B. HOUNSHELL, JR., EDWIN (PETE) R. JOHNSON, DONNA T. BAUCOM, DR. SAMUEL G. GRIFFIN, DR. LOUIS C. KANDL, DR. SAMUEL E. THOMPSON, EDWARD (RUSTY) R. KERR, O. DAVID WILLIAMS, JR., DONNIE JOE WHITLEY, MEMBERS OF THE STANLY COUNTY BOARD OF HEALTH; DR. JOSEPH BARRY [SIC] BASS, JR., BENJAMIN WASHINGTON AND MICHAEL GOFORTH

No. COA95-1176

(Filed 16 July 1996)

1. Municipal Corporations § 445 (NCI4th)— diminution in land value—exclusion from county liability policy

The trial court properly dismissed plaintiffs' action for diminution in value of their subdivision against a county health department, since there existed a liability insurance policy in excess of \$150,000; it contained explicit unequivocal language excluding coverage for any damage to property, including diminution in value and loss of use; and plaintiffs' claims came within this exclusion and were barred by sovereign immunity.

Am Jur 2d, Administrative Law §§ 487 et seq.; Municipal, County, School, and State Tort Liability §§ 37-40.

2. State § 38 (NCI4th)— agents of the State—negligence actions—Industrial Commission appropriate forum

A county health department director and registered sanitarians were agents of the State, and any action against them based on negligence must be filed in the Industrial Commission; there-

CARTER v. STANLY COUNTY

[123 N.C. App. 235 (1996)]

fore, the trial court correctly dismissed the actions against them filed in the superior court.

Am Jur 2d, Agency § 268; Municipal, County, School, and State Tort Liability §§ 648 et seq.

Judge WALKER dissenting.

Appeal by plaintiffs from order entered 14 June 1995 in Stanly County Superior Court by Judge Ronald L. Stephens. Heard in the Court of Appeals 4 June 1996.

Richard M. Warren for plaintiff-appellants.

Frank B. Aycock, III, Parker, Poe, Adams & Bernstein, by Fred T. Lowrance and Andrew D. Shore, and Michael W. Taylor, for defendant-appellees.

GREENE, Judge.

Joe Carter, Rebecca Carter and Crystal Ventures Corporation (plaintiffs) appeal an order granting summary judgment for Stanly County; William Dwight Smith, Chairman of the Stanly County Commissioners; Donnie Joe Whitley, Paul Edward Bowers, Sr., Thomas Edward Underwood, Melvin K. Huneycutt, County Commissioners; the Stanly County Health Department (Health Department); Jerry L. Burleson, J. Michael Hatley, Dr. Paul B. Hounshell, Jr., Edwin R. Johnson, Donna T. Baucom, Dr. Samuel G. Griffin, Dr. Louis C. Kandl, Dr. Samuel E. Thompson, Edward R. Kerr, O. David Williams, Jr., Donnie Joe Whitley, members of the Stanly County Board of Health; Dr. Joseph Baird Bass, Jr., Benjamin Washington (Washington) and Michael Goforth (Goforth) (collectively defendants).

Plaintiffs submitted an application to Washington, the Stanly County Environmental Health Supervisor and a registered sanitarian, requesting soils evaluation of a seventy-one acre tract of land. In response to plaintiffs' application, Goforth, a registered sanitarian with the Health Department, conducted a soils evaluation.

According to plaintiffs, Goforth stated that "75% to 80% of this property is suitable as it is, and probably all of it will pass if you will use a few low pressure systems." Based on the soils evaluation, plaintiffs began developing the property. Starting in "late 1989 and continu[ing] well into 1990" Goforth conducted more soils evaluations on

CARTER v. STANLY COUNTY

[123 N.C. App. 235 (1996)]

plaintiffs' individual lots and approved thirty-four, while rejecting at least twenty-four. On 30 June 1993, however, plaintiffs "were told, for the first time, that none of the lots [on the property] were suitable or would be approved." As a result of this information the valuation of the property by the Stanly County Tax Department dropped from \$663,717.00 to \$136,249.00.

Plaintiffs filed a complaint on 19 April 1994 alleging: (1) that defendants Goforth and Washington failed to properly inspect plaintiffs' property, which actions amounted to "negligence and gross and willful negligence"; (2) defendants Stanly County and the Health Department negligently hired, trained, and supervised Goforth and Washington; (3) Stanly County and the Health Department failed to adopt the accepted methods of the State Department of Human Resources for performing soils evaluations; (4) defendants' "actions and their agents and employees' statements about the property" constitutes slander of property; and (5) defendants' "actions in first approving lots . . . and then denying and withdrawing approval" amounted to "a taking . . . and an inverse condemnation of [p]laintiffs' property." It is also alleged that the actions of the defendants left them with "a subdivision that is unmarketable and practically worthless." Finally the plaintiffs alleged that to the extent sovereign immunity applied, that it had been waived by the purchase of liability insurance.

Attached to the complaint is a copy of a "Public Officials Liability Policy" in the amount of \$1,000,000.00, listing Stanly County as the named insured. Insured is further defined in the policy to include all "elected, appointed or employed officials" of Stanly County. Under the section labelled "EXCLUSIONS" the policy expressly states that it does not cover "any claim made against the INSURED" for any "damage to or destruction of any property, including diminution of value or loss of use thereof."

Defendants denied plaintiffs' claims for relief and moved for summary judgment, which the trial court granted.

The issue is whether the defendants are immune from suit in superior court.

"[T]he doctrine of sovereign immunity precludes suit against the State and its agencies unless the State has consented to be sued or waived its right." *EEE-ZZZ Lay Drain Co. v. North Carolina Dept. of Human Resources*, 108 N.C. App. 24, 27, 422 S.E.2d 338,

CARTER v. STANLY COUNTY

[123 N.C. App. 235 (1996)]

340 (1992). With regard to tort claims against “departments, institutions and agencies of the State,” the State has waived its immunity up to the amount of \$150,000.00; provided the claim is filed with the North Carolina Industrial Commission. N.C.G.S. § 143-291(a) (Supp. 1995) (State Tort Claims Act). Immunity is also waived by agencies of the State upon the purchase of an insurance policy insuring the loss. *McNeill v. Durham County ABC Bd.*, 87 N.C. App. 50, 57, 359 S.E.2d 500, 504 (1987), *modified on other grounds*, 322 N.C. 425, 368 S.E.2d 619 (1988). When there is insurance covering the loss in an amount equal to or greater than \$150,000.00 and the claim is within the scope of the State Tort Claims Act, the claim is properly filed in the Superior Court. *Meyer v. Walls*, 122 N.C.App. 507, 513-14, 471 S.E.2d 422, 427, (1996).

A. Stanly County Health Department

[1] With regard to sewage treatment and disposal and the issuance of improvement permits, local health departments act as agents of the State and are therefore “immune from suit” in the courts of general jurisdiction, *EEE-ZZZ Lay Drain Co.*, 108 N.C. App. at 28, 422 S.E.2d at 341, unless there exists a liability insurance policy covering the loss with limits in excess of \$150,000.00. In this case, although there exists a liability insurance policy in excess of \$150,000.00, it contains explicit unequivocal language excluding coverage for any damage to property, including diminution of value and loss of use. The plaintiffs’ claims fall within this exclusion because they seek damages only for the diminished value of their property. Specifically, the plaintiffs claim that the actions of the defendants left them with “a subdivision that is unmarketable and practically worthless.” Accordingly, the purchase of the liability insurance policy does not waive the County’s immunity and the rule stated in *Meyer* does not apply. Because the claims are against an agency of the State and within the scope of the State Tort Claims Act, the trial court was correct in dismissing the action against the Health Department.

B. Dr. Joseph Baird Bass, Jr., Benjamin Washington
and Michael Goforth

[2] Because the Health Department is an agent of the State, it follows that its director and registered sanitarians are also agents of the State. *See Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 686-87, 252 S.E.2d 792, 795 (1979) (director and staff of county Department of Social Services are agents of the State). Therefore, because the liability policy provides no coverage, any action against them based on

CARTER v. STANLY COUNTY

[123 N.C. App. 235 (1996)]

negligence must be filed in the Industrial Commission and the trial court correctly dismissed the actions against them filed in the Stanly County Superior Court.

C. Stanly County, County Commissioners and Board of Health

Plaintiffs' complaint alleges that the "County and its Board of Health [and County Commissioners] are liable under the doctrines of principal and agent and respondeat supervisor." Because we have determined that the Health Department, its director, and registered sanitarians are immune from suit in superior court, it follows that these other parties have no liability and summary judgment for these defendants was proper.

Affirmed.

Judge MARTIN, John C., concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I dissent from the majority opinion on the basis of this Court's recent decision in *Meyer v. Walls*, 122 N.C. App. 507, 471 S.E.2d 422 (1996) which held that where a government entity waives the defense of sovereign immunity by purchasing liability insurance in an amount equal to or in excess of the coverage provided by the Tort Claims Act, jurisdiction rests with the superior court. Here, plaintiffs allege that the defendants waived immunity by purchasing liability insurance.

I would remand this cause to the superior court to make findings of fact as to whether the insurance policy or policies in question have liability limits equal to or greater than the coverage provided by the Tort Claims Act. Further, the court should make findings regarding whether the policy provides coverage for any or all of the plaintiffs' claims. If the policy provides coverage which is equal to or greater than the amount provided by the Tort Claims Act, jurisdiction properly rests in the Superior Court. If not, jurisdiction is in the Industrial Commission and the superior court should dismiss the action for lack of subject matter jurisdiction.

STATE v. DAVIS

[123 N.C. App. 240 (1996)]

STATE OF NORTH CAROLINA v. CURTIS LEE DAVIS

No. COA95-1056

(Filed 16 July 1996)

1. Appeal and Error § 182 (NCI4th)— amendments to judgment after notice of appeal—no jurisdiction of court

The trial court had no jurisdiction, while defendant's case was on appeal, to amend the original order arresting judgment or to amend the judgment and commitment from which he appealed where the amended judgments did not accurately reflect the actual proceedings and therefore were not a proper exercise of the court's inherent power to make its records correspond to the actual facts and "speak the truth."

Am Jur 2d, Appellate Review §§ 421, 436.

2. Criminal Law § 1284 (NCI4th)— arrested judgment on underlying felonies—sentence as habitual felon—error

The trial court erred by sentencing defendant as a habitual felon after having arrested judgment in all the underlying felonies for which defendant was convicted.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 6-9.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR5th 263.

What constitutes "violent felony" for purpose of sentence enhancement under Armed Career Criminal Act (18 USCS sec. 924(e)(1)). 119 ALR Fed. 319.

What constitutes three previous convictions for offenses committed on occasions different from one another for purpose of sentence enhancement under Armed Career Criminal Act (18 USCS sec. 924(e)). 123 ALR Fed. 397.

3. Criminal Law § 980 (NCI4th)— arrested judgment based on judge's misstatement—guilty verdicts remain

Where the judgment is arrested because of a misstatement of the trial judge, no other basis appearing, and there is no impediment to the entry of a lawful judgment, the guilty verdicts remain

STATE v. DAVIS

[123 N.C. App. 240 (1996)]

on the docket and judgment on those convictions may be entered upon remand.

Am Jur 2d, Criminal Law § 524.

Appeal by defendant from judgment entered 21 February 1995 by Judge Lester P. Martin, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 15 May 1996.

Attorney General Michael F. Easley, by Associate Attorney General Teresa L. Harris, for the State.

John D. Bryson for defendant-appellant.

MARTIN, John C., Judge.

Defendant was indicted for felonious breaking or entering, felonious larceny and felonious possession of property stolen pursuant to the breaking or entering. By a separate indictment pursuant to G.S. § 14-7.3, he was charged with having committed the foregoing offenses while being an habitual felon. A jury returned verdicts finding defendant guilty of felonious breaking or entering, felonious larceny and felonious possession of property stolen pursuant to a breaking or entering. Defendant then admitted his status as an habitual felon. The record reflects the entry of a written order providing, in pertinent part, as follows:

Motion is made by the State to Arrest Judgment as to Felonious Breaking and Entering, Larceny, and Possession of Stolen Goods due to double jeopardy, being the defendant pled Guilty to being a Habitual Felon. Motion is allowed.

It is therefore ORDERED by the Court to Arrest Judgment as to Felonious Breaking and Entering, Larceny, and Possession of Stolen Goods and the Court in its discretion will sentence the defendant on the Habitual Felon charge.

The trial court then entered a judgment and commitment sentencing defendant to a twenty-five year term of imprisonment as an habitual felon. Defendant gave notice of appeal.

Defendant served the proposed record on appeal upon the State, containing a single assignment of error that the trial court had committed error by sentencing defendant as an habitual felon after arresting judgment as to the underlying felonies. The State objected to the inclusion of the above quoted portion of the trial court's order arrest-

STATE v. DAVIS

[123 N.C. App. 240 (1996)]

ing judgment in the record on appeal. The trial court conducted a hearing to settle the record on appeal and found that the order arresting judgment and the judgment and commitment "do not accurately reflect the Court's judgment as delivered in open Court on 21 February 1995." The trial court entered an amended judgment, providing in pertinent part, as follows:

The Jury returns into open court with its verdict and finds the defendant Guilty of Felonious Breaking and Entering, Larceny, and Possession of Stolen Goods.

Motion is made by the State to Arrest Judgment as to Possession of Stolen Goods. Motion is allowed.

IT IS THEREFORE ORDERED by the Court to Arrest Judgment as to Possession of Stolen Goods.

The trial court entered an amended judgment and commitment in cases 94 CRS 9213 and 94 CRS 20109 sentencing defendant to a twenty-five year term of imprisonment for felonious breaking or entering and felonious larceny while being an habitual felon. The amended judgment and amended judgment and commitment were ordered to be made a part of the record on appeal.

The record on appeal was filed and docketed in this Court on 20 September 1995. Thereafter, defendant moved to amend the record to assert a second assignment of error and his motion was allowed.

I.

[1] Initially, we consider defendant's second assignment of error, by which he asserts the trial court had no jurisdiction, while the case was on appeal, to amend the original order arresting judgment or to amend the judgment and commitment from which he appealed. The assignment of error has merit.

The general rule is that the jurisdiction of the trial court is divested when notice of appeal is given, except that the trial court retains jurisdiction for matters ancillary to the appeal, including settling the record on appeal. N.C. Gen. Stat. § 15A-1448(a)(3); N.C. Gen. Stat. § 15A-1453; N.C.R. App. P. 11; *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E.2d 748 (1977); *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). In addition, a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions

STATE v. DAVIS

[123 N.C. App. 240 (1996)]

therein. *State v. Cannon*, 244 N.C. 399, 94 S.E.2d 339 (1956). 19 Strong's N.C. Index 4th *Judgments* § 92 (1989). In doing so, however,

the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred.

Cannon, 244 N.C. at 404, 94 S.E.2d at 342.

Our review of the trial transcript in this case reveals no motion by the State to arrest judgment as to the charge of possession of stolen property, and no indication that the court did so *ex mero motu*. Indeed, the judgment of the court, as rendered in open court, indicates that the court did not arrest judgment as to any of the three felonies for which defendant was convicted by the jury. After the court accepted the jury's verdicts, defendant admitted the existence of prior convictions necessary to establish his status as an habitual felon. The trial court then entered judgment as follows:

Stand up, please, Mr. Davis.

In this case, the Court would find that, in addition to these three convictions which comprise the habitual felon charge, you have also other convictions that would be aggravating factors outweighing any mitigating factors. And it's the judgment of the Court you should be confined to the Department of Correction for a period of 25 years.

Thus, we must conclude that the amended judgments do not accurately reflect the actual proceedings and, therefore, were not a proper exercise of the court's inherent power to make its records correspond to the actual facts and "speak the truth." To the contrary, it appears that the amended judgments impermissibly corrected a judicial error. Though the original judgment clearly does not reflect the intentions of the trial court, the court was without jurisdiction to amend the judgments in the course of settling the record on appeal; accordingly, they must be vacated.

II.

[2] Because the amended judgments must be vacated, the trial court's original order arresting judgment remains in effect, and we must also sustain defendant's first assignment of error that the trial court erred by sentencing defendant as an habitual felon after having arrested judgment in all the underlying felonies for which defendant

STATE v. DAVIS

[123 N.C. App. 240 (1996)]

was convicted. "Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). The original judgment and commitment from which defendant appeals is, therefore, vacated.

III.

[3] Having decided that the original judgment and commitment, the amended judgment arresting judgment, and the amended judgment and commitment must be vacated, we are left with the question of the effect of the trial court's original order arresting judgment as to all three of the felonies for which defendant was convicted.

A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment (citations omitted).

State v. Perry, 291 N.C. 586, 589, 231 S.E.2d 262, 265 (1977). In certain cases, an arrest of judgment based upon one of the above grounds operates to vacate the verdict; however in other instances "an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact." *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). When the basis for an order arresting judgment is a fatal flaw appearing on the face of the record, the verdict must be vacated and the State must seek a new indictment in order to prosecute the defendant. *Id.*

However, where, as here, the judgment is arrested because of what is clearly demonstrated as the result of a misstatement of the trial judge, no other basis appearing, and there is no impediment to the entry of a lawful judgment, we hold that the guilty verdicts remain on the docket and judgment on those convictions may be entered upon remand. *See, eg., State v. Hall*, 183 N.C. 806, 112 S.E. 431 (1922) (where trial court arrested judgment on a manslaughter conviction under a mistaken assumption, Supreme Court held that because no legal impediment existed, the arrest of judgment was set aside and the case was remanded for resentencing); *Pakulski*, 326 N.C. 434, 439,

STATE v. DAVIS

[123 N.C. App. 240 (1996)]

390 S.E.2d 129, 132 (where judgment was arrested upon the predicate felonies in a felony murder case to avoid double jeopardy, then on retrial the felony murder charge was dropped, Supreme Court held that as no legal impediment remained requiring the arrest of the predicate felonies, the defendant could be sentenced upon those convictions).

In the case before us, though judgment must be arrested as to defendant's conviction for felonious possession of stolen property, *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982) (holding that although larceny and possession of stolen property are separate and distinct offenses, the Legislature did not intend to punish a defendant for larceny of property and possession of the same property that he stole), there is no legal impediment to the imposition of sentence in either of the convictions for felonious breaking or entering, or felonious larceny, and to the enhancement of the punishment by reason of defendant's status as an habitual felon. Thus, the verdicts remain valid and intact and the trial court's order arresting judgment has served simply to withhold judgment on those verdicts.

In summary, the original judgment and commitment of the trial court in Case No. 94 CRS 20109 is vacated; the amended judgment and amended judgment and commitment in Cases No. 94 CRS 9213 and 94 CRS 20109 are vacated, and these cases are remanded to the trial court for a sentencing hearing and the entry of judgment consistent with this opinion.

Case No. 94 CRS 20109—Judgment and Commitment Vacated.

Case Nos. 94 CRS 20109 and 94 CRS 9213—Amended Judgment and Amended Judgment and Commitment Vacated; Remanded for resentencing.

Judges GREENE and WALKER concur.

WIEBENSON v. BD. OF TRUSTEES, STATE EMPLOYEES' RET. SYS.

[123 N.C. App. 246 (1996)]

MOLLY WIEBENSON, PETITIONER, v. BOARD OF TRUSTEES, TEACHERS' AND
STATE EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. COA95-1070

(Filed 16 July 1996)

1. Public Officers and Employees § 42 (NCI4th)— six-month worker—no state employee

Pursuant to the plain language of N.C.G.S. § 135-1(10), petitioner who shared a position and worked only six months out of the year was not a State "employee," since the statute clearly provides that a person must work at least nine months per year to be an employee and be eligible to participate in the Retirement System.

Am Jur 2d, Civil Service §§ 13 et seq.**Vested right of pensioner to pension. 52 ALR2d 437.****2. Retirement § 6 (NCI4th)— agency director's representations to employee—ratification by Retirement System—estoppel to deny benefits**

The State was estopped from denying petitioner's retirement coverage for the contested period where the director of her agency represented that he had cleared her job sharing arrangement with DHR; he explicitly stated that petitioner would continue to be a participating member of the Retirement System; by his statements the director purported to be the Retirement System's agent; petitioner reasonably relied on his representations; and the Retirement System ratified the director's representations and statements to petitioner by continuing to send petitioner yearly statements indicating that petitioner was still a participating member of the Retirement System.

Am Jur 2d, Estoppel §§ 35-38; Pensions and Retirement Funds §§ 1711-1737.**Comment Note.—Quantum or degree of evidence necessary to prove an equitable estoppel. 4 ALR3d 361.**

Appeal by petitioner from judgment entered 7 June 1995 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 21 May 1996.

WIEBENSON v. BD. OF TRUSTEES, STATE EMPLOYEES' RET. SYS.

[123 N.C. App. 246 (1996)]

Molly Wiebenson (hereinafter petitioner) worked full-time as a rehabilitation therapist for the Alcoholic Rehabilitation Center (hereinafter ARC) in Black Mountain, North Carolina from October 1971 until May 1984. During this time, petitioner was a member of the Teachers' and State Employees' Retirement System (hereinafter Retirement System). In 1981, the General Assembly enacted a work options program for state employees which was designed to improve "employee morale and productivity" by providing options for flexible work hours, job sharing, and permanent part-time positions. G.S. 126-75.

In 1984, petitioner and another rehabilitation therapist at the Black Mountain ARC, Evelyn Brank, approached Millard P. Hall, Jr., the Director of the ARC, to inquire about their sharing one position, each working six months out of the year. Petitioner and Ms. Brank sought assurances that their retirement eligibility with the State would not be jeopardized by participating in the job sharing program. Mr. Hall sent them a memorandum in which he stated that he had "pursued this with the DHR Personnel" and that it would be possible for petitioner and Ms. Brank to share one position. Mr. Hall further stated that:

During the six months each of you work per year your Retirement, Insurance and other deductions you may have will be processed through the normal channels of deductions of payroll. During the months you are on leave you will be able to pay to the system your portion of these benefits and be maintained within the Retirement Insurance and other benefit packages you are currently enrolled in.

Thereafter, petitioner and Ms. Brank decided to pursue the job sharing option and from 31 May 1984 through 19 January 1992, petitioner worked six months out of the year at the ARC. The Retirement System continued to provide petitioner with annual statements, showing that petitioner was accumulating retirement credit each year from 1984 through 1990. In late 1991, petitioner began making inquiries to the Retirement System in preparation for retirement. In a 15 November 1991 letter, J. Marshall Barnes, III, Deputy Director of the Department of State Treasurer, informed petitioner that the job sharing arrangement did not allow employees to participate in the Retirement System and therefore petitioner had not been a member of the system since May 1984. Mr. Barnes' letter informed petitioner that the Retirement System would refund all retirement contributions

WIEBENSON v. BD. OF TRUSTEES, STATE EMPLOYEES' RET. SYS.

[123 N.C. App. 246 (1996)]

plus interest that petitioner had made during the time she participated in the job sharing program.

Petitioner petitioned the Office of Administrative Hearings for a contested case hearing. After a hearing, an Administrative Law Judge entered his recommended decision on 26 May 1994, concluding that petitioner was not an "employee" within the meaning of G.S. 135-1(10) during the years that she participated in the job sharing program because the statute requires a minimum of nine months of employment per year. On 11 August 1994, State Treasurer Harlan E. Boyles entered a final agency decision adopting the recommended decision. Superior Court Judge Dennis J. Winner upheld the recommended decision on 7 June 1995.

Petitioner appeals.

Thomas D. Roberts for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for respondent-appellee.

EAGLES, Judge.

I.

[1] Petitioner first argues that the superior court erred in concluding that petitioner was not a State "employee" within the meaning of G.S. 135-1(10). All State "employees" are members of the Teachers' and State Employees' Retirement System. G.S. 135-3(1). G.S. 135-1(10) provides in pertinent part:

"Employee" shall mean all full-time employees, agents or officers of the State of North Carolina or any of its departments, bureaus and institutions other than educational, whether such employees are elected, appointed or employed. . . . Employees of State agencies, departments, institutions, boards, and commissions who are employed in permanent job positions on a recurring basis and who work 30 or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision.

Petitioner argues that the nine month provision only applies to teachers or other State employees "working a teacher's schedule." We disagree. The language of the statute clearly provides that a person must work at least nine months per year to be an "employee" and be eligible to participate in the Retirement System. Petitioner only worked

WIEBENSON v. BD. OF TRUSTEES, STATE EMPLOYEES' RET. SYS.

[123 N.C. App. 246 (1996)]

six months out of the year during the last seven and one-half years of her employment at the ARC. Pursuant to the plain language of the statute, petitioner was not an "employee."

II.

[2] Petitioner next argues that the State should be estopped from denying petitioner's retirement coverage for the contested period based on her Director's representations and her detrimental reliance on his representations. Petitioner relies on *Fike v. Bd. of Trustees*, 53 N.C. App. 78, 279 S.E.2d 910, *disc. review denied*, 304 N.C. 194, 285 S.E.2d 98 (1981), where this Court held that the State was estopped from denying Mr. Fike's claim for retirement benefits. Mr. Fike and his wife were both employees of North Carolina State University. After Mr. Fike learned that his wife was terminally ill, he consulted Mrs. Ruth Ellis, the Payroll and Benefits Manager employed by North Carolina State University, "concerning retirement options, salary continuation and social security benefits for his wife." *Fike*, 53 N.C. App. at 78, 279 S.E.2d at 911. Mr. Fike filled out various forms in Mrs. Ellis's office on 15 August 1978, but Mrs. Ellis failed to file the retirement disability application. *Id.* After not receiving any payment by 29 September 1978, Mr. Fike discovered that the Retirement System had not received a disability retirement application for his wife. *Id.* at 79, 279 S.E.2d at 911. Mrs. Ellis was advised to immediately file the application. The Retirement System received the application on 2 October 1978 which meant that the earliest possible effective date for Mrs. Fike's retirement was 1 November 1978. *Id.* at 79, 279 S.E.2d at 912. Mrs. Fike died on 13 October 1978. *Id.* The Board of Trustees for the Retirement System found that Mrs. Fike was never retired and was not entitled to a monthly benefit from the Retirement System because she died before the effective date of her retirement. Mr. Fike appealed the Retirement System's decision, contending that Mrs. Ellis was the Retirement System's agent and therefore the Retirement System was estopped from denying Mr. Fike retirement benefits.

In *Fike*, we stated that it was doubtful that the Retirement System had sufficient control over Mrs. Ellis or the University for Mrs. Ellis to be the Retirement System's actual agent. *Id.* at 81, 279 S.E.2d at 913. However, the Retirement System Handbook, which Mr. Fike had read, provided that a retiree was to return the completed application to the retiree's personnel officer and was not to return the application directly to the Retirement System. *Fike*, 53 N.C. App. at 81, 279 S.E.2d at 913. Because Mr. Fike had followed the procedures established by

WIEBENSON v. BD. OF TRUSTEES, STATE EMPLOYEES' RET. SYS.

[123 N.C. App. 246 (1996)]

the Board and had "relied on Mrs. Ellis' assertions that he had done all that was necessary," we held that the Retirement System was estopped from denying Mr. Fike retirement benefits. *Id.*

Fike is arguably distinguishable from petitioner's case. Here, petitioner has failed to show that she relied on any Retirement System publication which directed her to rely on her Director's representations. Nevertheless, we conclude that the doctrine of ratification applies here to bind the Retirement System:

It is elementary that when one, with no authority whatever, or in excess of the limited authority given him, makes a contract as agent for another, or purporting to do so as such agent, the supposed principal, upon discovery of the facts, may ratify the contract, in which event it will be given the same effect as if the agent, or purported agent, had actually been authorized by the principal to make the contract prior to the making thereof.

Patterson v. Lynch, Inc., 266 N.C. 489, 492, 146 S.E.2d 390, 393 (1966). Here, petitioner's supervising ARC director indicated to her in his memo that he had discussed the possibility of petitioner and Ms. Brank sharing one position with the Department of Human Resources and that DHR had approved the job-sharing option. Petitioner's director also explicitly stated to petitioner in his memo that petitioner would continue to be a participating member of the Retirement System. We conclude that the ARC director, by his statements, purported to be the Retirement System's agent and that petitioner reasonably relied on his representations. The record includes copies of yearly statements that the Retirement System provided to petitioner for each year from 1985 through 1990 which indicated that she was continuing to accumulate retirement credit in the Retirement System. We conclude that the Retirement System ratified the director's representations and statements to petitioner by continuing to accept her contributions to the Retirement System and by continuing to send petitioner yearly statements indicating that petitioner was still a participating member of the Retirement System. Accordingly, we also conclude that the Retirement System may not now assert that petitioner is not entitled to retirement credit for the years that she participated in the job-sharing program.

Reversed and remanded.

Judges WYNN and SMITH concur.

CARTNER v. NATIONWIDE MUTUAL FIRE INS. CO.

[123 N.C. App. 251 (1996)]

DAVID CARTNER, ANCILLARY ADMINISTRATOR OF THE ESTATE OF DIANNE ARTHUR,
PLAINTIFF-APPELLEE V. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT

No. COA95-1092

(Filed 16 July 1996)

Insurance § 435 (NCI4th)— automobile liability insurance—no family member exclusion—coverage required by conformity clause

Where a person is injured through the negligence of an insured family member while riding with that family member in an insured vehicle, North Carolina's Financial Responsibility Act prevents the operation of a family member exclusion in the policy's liability section to bar coverage; therefore, the trial court properly found that liability coverage for insured persons injured through the negligence of a family member while riding in an insured vehicle is a "kind of coverage" required by North Carolina's Financial Responsibility Act, and, pursuant to the language of the conformity provisions of the policy in question, defendant was required to adjust the limits of its Florida policy to provide such coverage to plaintiff's decedent as required by North Carolina.

Am Jur 2d, Automobile Insurance § 247.

Validity, construction, and application of provision of automobile liability policy excluding from coverage injury or death of member of family or household of insured. 46 ALR3d 1024.

Who is "resident" or "member" of same "household" or "family" as named insured, within liability insurance provision defining additional insureds. 93 ALR3d 420.

Application of automobile insurance "entitlement" exclusion to family member. 25 ALR5th 60.

Appeal by defendant from declaratory judgment entered 1 September 1995 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 22 May 1996.

CARTNER v. NATIONWIDE MUTUAL FIRE INS. CO.

[123 N.C. App. 251 (1996)]

Elmore, Elmore & Williams, P.A., by Bruce A. Elmore, Jr. and Cynthia L. Cooke, for plaintiff-appellee.

Ball Barden Contrivo & Bell, P.A., by Frank J. Contrivo and Benjamin R. Olinger, Jr., for defendant-appellant.

WALKER, Judge.

On 5 June 1994, plaintiff's decedent, Dianne Arthur, was killed when the vehicle in which she was a passenger went out of control on a rural road in Haywood County, North Carolina. At the time of the accident, the vehicle was being driven by Dianne Arthur's husband, Jerome S. Arthur. Plaintiff filed an action for a declaratory judgment holding defendant liable to Dianne Arthur's estate under an insurance policy covering the vehicle. Defendant admitted that the accident was the direct and proximate result of the negligence of Jerome Arthur, but denied liability to Dianne Arthur's estate under the policy. Both parties moved for summary judgment. On 1 September 1995, the trial court entered a declaratory judgment in favor of plaintiff.

The personal motor vehicle liability and automobile insurance policy at issue, Policy # 77 N 557771 (the Policy), was issued to Jerome S. Arthur and Dianne J. Arthur for the period from 2 June 1994 through 1 December 1994. The Policy provided coverage for two separate vehicles, including the automobile involved in the accident which precipitated the instant action. At the time the Policy was issued, the Arthurs were residents of Florida, and the Policy was issued in Florida.

The Policy provided for bodily injury liability coverage of \$10,000 for each person or \$20,000 for each occurrence. The Policy defined bodily injury to include death. Further, under the "Financial Responsibility" section, the Policy provided:

1. We will adjust the limits of coverages the policyholder has purchased to comply with the financial responsibility law of any state or province which requires higher limits.
2. Also, we will adjust the policy to include the limits *and kinds of coverage* required of non-residents by any compulsory motor vehicle law or similar law of a state or province other than Florida.

(emphasis added) (hereinafter "the conformity provisions"). The liability section of the Policy also contained a provision excluding cov-

CARTNER v. NATIONWIDE MUTUAL FIRE INS. CO.

[123 N.C. App. 251 (1996)]

erage for bodily injury to any insured or any member of an insured's family residing in the insured's household (hereinafter "the family member exclusion").

After making findings consistent with the above facts, the trial court found as follows:

9. That North Carolina General Statute 279.21(b)(2) provides that automobiles operated within the State of North Carolina maintain liability insurance within minimum limits of \$25,000 for injury to any one person, and \$50,000 for injury to two or more persons injured in any one accident.

10. That nowhere within N.C.G.S. 279.21(b)(2), Article 9A of Chapter 20, the Motor Vehicle Safety and Financial Responsibility Act, nor anywhere else in the General Statutes of North Carolina is it provided that an insurance company may exclude coverage to an insured who is injured through the negligence of a family member while riding in an insured vehicle operated by the family member.

The court then concluded that the Policy provided coverage to the decedent's estate.

The record reflects that although both parties moved for summary judgment, the trial court rendered its judgment based on plaintiff's motion for declaratory judgment under N.C. Gen. Stat. Chapter 1, Article 26. Thus, if the trial court's findings are supported by any competent evidence, they are conclusive on appeal, even if there is evidence which might sustain findings to the contrary. N.C. Gen. Stat. § 1-258 (1983); *Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475, *review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981).

Defendant acknowledges on appeal that, by virtue of the conformity provisions, the Policy's per-person limit of \$10,000 for liability would be increased to the North Carolina minimum amount of \$25,000 if Dianne Arthur were entitled to liability coverage. However, defendant contends that the family member exclusion contained in the Policy operates to bar liability coverage to Dianne Arthur under the facts of this case. Plaintiff, on the other hand, argues that the conformity provisions of the Policy mandate that defendant provide the "kinds of coverage" required by North Carolina's Financial Responsibility Act (the Act) and that in conforming the Policy to the Act, the family member exclusion is rendered void.

CARTNER v. NATIONWIDE MUTUAL FIRE INS. CO.

[123 N.C. App. 251 (1996)]

Both parties agree that the Policy's provisions must be construed in accordance with the law of Florida, where the Policy was issued. *Roomy v. Insurance Co.*, 256 N.C. 318, 322, 123 S.E.2d 817, 820 (1962); *Johns v. Automobile Club Ins. Co.*, 118 N.C. App. 424, 426, 455 S.E.2d 466, 468, *review denied*, 340 N.C. 568, 460 S.E.2d 318 (1995). Defendant argues that under this rule of *lex loci*, the only relevant law is Florida law, which has consistently upheld the family member exclusion. In support of this argument, defendant cites the *Johns* case, where the plaintiffs, who were Tennessee residents related to each other and residing in the same household, were injured in an accident in North Carolina. *Johns*, 118 N.C. App. at 425, 455 S.E.2d at 467. The plaintiffs' Tennessee insurance policies contained family member exclusions, and the defendants denied coverage. *Id.* at 425-26, 455 S.E.2d at 467-68. Following the principle of *lex loci*, this Court held that Tennessee law should apply and that North Carolina's Financial Responsibility Act did not work to obviate the family member exclusions which had been repeatedly upheld by Tennessee courts. *Id.* at 428, 455 S.E.2d at 469.

Although *Johns* correctly applies the principle of *lex loci*, it does not control the instant case. The *Johns* decision makes no mention of any conformity clause in the Tennessee policy. With no indication that the *Johns* court considered such a provision, we differentiate the ruling in *Johns*. Thus, we are left with the language of the Policy itself, which, by its very terms, requires us to examine North Carolina law to determine the "kinds of coverage" afforded to Dianne Arthur thereunder.

We have found no North Carolina cases directly addressing the validity of a family member exclusion in the liability section of a North Carolina policy. The *Johns* court, citing *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991), stated that "North Carolina's legislature, in North Carolina's Financial Responsibility Act at North Carolina General Statutes § 20-279.21(b) (1993), has determined that family members are not to be excluded from primary or UM/UM coverage." *Johns*, 118 N.C. App. at 428, 455 S.E.2d at 469. In *Smith*, the court held that a family member exclusion contained in the liability section of a policy may not be applied to deny coverage under the UM/UM provisions of the same policy. *Smith*, 328 N.C. at 153, 400 S.E.2d at 53. The *Smith* court declined to address the issue of whether a family member exclusion in the UM/UM section of a North Carolina policy would be valid. *Id.* at 150, 400 S.E.2d at 51.

CARTNER v. NATIONWIDE MUTUAL FIRE INS. CO.

[123 N.C. App. 251 (1996)]

However, subsequent cases have squarely held that a family member exclusion contained in the UM/UIM section of a North Carolina policy is void. *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 684, 462 S.E.2d 650, 653 (1995) (regarding UM coverage); *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 497, 467 S.E.2d 34, 43 (1996) (regarding UIM coverage). As the *Bray* court stated, "Since the primary purpose of the [Financial Responsibility Act] is to compensate innocent victims of financially irresponsible motorists, allowing the family member/household-owned vehicle exclusion to deny UM coverage would contravene the purpose of the [A]ct." *Bray*, 341 N.C. at 684, 462 S.E.2d at 653. *See also Mabe*, 342 N.C. at 493, 467 S.E.2d at 41 (purpose of the Financial Responsibility Act is to compensate innocent victims of financially irresponsible motorists).

Following the rationale of *Bray* and *Mabe*, we are of the opinion that where, as here, a person is injured through the negligence of an insured family member while riding with that family member in an insured vehicle, North Carolina's Financial Responsibility Act prevents the operation of a family member exclusion in the policy's liability section to bar coverage. To reach any other result would be to deny plaintiff's decedent a means of recovering under the Policy for her injuries caused by her husband's negligence. We do not think North Carolina's legislature intended to sanction such a result. Therefore, as the trial court found, liability coverage for insured persons injured through the negligence of a family member while riding in an insured vehicle is a "kind of coverage" required by North Carolina's Financial Responsibility Act. Pursuant to the language of the conformity provisions of the Policy, defendant was required to adjust the limits of its Florida policy to provide such coverage to plaintiff's decedent as required by North Carolina. Thus, the trial court correctly found that nothing in the Financial Responsibility Act provides that "an insurance company may exclude coverage to an insured who is injured through the negligence of a family member while riding in an insured vehicle operated by the family member." We hold the trial court correctly concluded that the Policy provides coverage to the estate of plaintiff's decedent.

The judgment of the trial court is

Affirmed.

Judges GREENE and MARTIN, JOHN C. concur.

ACT-UP TRIANGLE v. COMMISSION FOR HEALTH SERVICES

[123 N.C. App. 256 (1996)]

ACT-UP TRIANGLE (AIDS COALITION TO UNLEASH POWER TRIANGLE), STEVEN HARRIS, AND JOHN DOE, PLAINTIFFS-APPELLANTS v. COMMISSION FOR HEALTH SERVICES OF THE STATE OF NORTH CAROLINA, DR. JESSE MEREDITH, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE COMMISSION FOR HEALTH SERVICES OF THE STATE OF NORTH CAROLINA, DR. RONALD H. LEVINE, IN HIS OFFICIAL CAPACITY AS STATE HEALTH DIRECTOR AND ASSISTANT SECRETARY OF HEALTH OF THE STATE OF NORTH CAROLINA, MR. JONATHAN HOWES, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES OF THE STATE OF NORTH CAROLINA, AND MS. DEBBY CRAIN, AS DIRECTOR OF THE DIVISION OF PUBLIC AFFAIRS, DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES OF THE STATE OF NORTH CAROLINA, DEFENDANTS-APPELLEES

No. COA95-843

(Filed 16 July 1996)

Administrative Law and Procedure § 54 (NCI4th)— exercise of agency's rulemaking power—no judicial review available

Neither the superior court nor the Court of Appeals had jurisdiction to review the Commission for Health Services' exercise of its rulemaking power with regard to anonymous HIV testing.

Am Jur 2d, Administrative Law § 424.

Appeal by plaintiffs from order entered 9 June 1995 by Judge Narley Cashwell in Wake County Superior Court. Heard in the Court of Appeals 17 April 1996.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiff appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock and Associate Attorney General Grady L. Balentine, Jr., for defendant appellees.

PER CURIAM.

On 22 April 1994, plaintiffs ACT-UP Triangle (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe filed a "Petition for Amendment of Administrative Rule 15A NCAC 19A.0102(a)(3) with the Commission for Health Services (Commission)." The then existing rule would have eliminated anonymous HIV testing by local health departments by 1 September 1994. Plaintiffs' proposed rule would have extended anonymous HIV testing indefinitely and repealed the provision which provided for the termination of anonymous HIV testing by 1 September 1994. The

ACT-UP TRIANGLE v. COMMISSION FOR HEALTH SERVICES

[123 N.C. App. 256 (1996)]

Commission met on 27 April 1994 and denied plaintiffs' petition requesting the Commission exercise its rulemaking authority.

On 9 June 1994, plaintiffs filed a complaint and petition for judicial review in Wake County Superior Court. Plaintiffs asked the court to issue a temporary restraining order, preliminary injunction and permanent injunction, thus compelling the Commission to continue its program of anonymous HIV testing in North Carolina. Plaintiffs also asked the court to reverse the final agency decision of the Commission and order the repeal of N.C. Admin. Code tit. 15A, r. 19A.0102(a)(3) (February 1992) (hereinafter 15A NCAC 19A.0102(a)(3)). In addition, plaintiffs sought to introduce new evidence including statistics on the anonymous testing program and analysis conducted by the Center for Disease Control.

On 31 August 1994, Judge Gordon F. Battle heard plaintiffs' motion to allow presentation of new evidence and complaint and petition for judicial review seeking a preliminary injunction. Judge Battle stayed the final agency decision to eliminate anonymous testing and remanded the case to the Commission for hearing plaintiffs' presentation of additional evidence. Judge Battle also ordered the Commission to reconsider its decision in light of this evidence. The court enjoined defendants from eliminating anonymous HIV testing within the State of North Carolina. In addition, the court ordered defendants to maintain their current program of anonymous HIV testing until a final judicial review was completed by the court.

The Commission exercised its rulemaking authority, and on 4 November 1994, voted favorably on a compromise proposal to enact a new temporary rule which would extend anonymous HIV testing for two years of additional study. The temporary rule was passed with a provision that it would expire on 15 June 1995 if it was not adopted as a permanent rule.

Through the enactment of the temporary rule, plaintiffs partially obtained the relief sought. Judge Battle subsequently granted plaintiffs' motion, as prevailing parties, for attorney's fees and other costs on 12 December 1994.

Subsequently, on 9 February 1995, the Commission, again exercising its rulemaking authority, voted to repeal the temporary rule thereby eliminating anonymous HIV testing, in accordance with the original rule 15A NCAC 19A.0102(a)(3) that was challenged by plaintiffs. The Commission's order stated that plaintiffs' petition was

ACT-UP TRIANGLE v. COMMISSION FOR HEALTH SERVICES

[123 N.C. App. 256 (1996)]

“denied” even though, in actuality, the Commission exercised its rule-making authority in hearing the evidence, in adopting the temporary rule and in repealing the same. Apparently, in denying the petition the Commission meant that it was denying the requested relief. Thereafter plaintiffs filed an amendment to the complaint and petition for judicial review, dated 8 March 1995, in superior court seeking to allege additional facts occurring after the original remand to the Commission.

On 17 May 1995, Judge Narley L. Cashwell allowed the complaint and petition for judicial review to be amended. On 9 June 1995, Judge Cashwell denied the petition to delete the provision of 15A NCAC 19A.0102(a)(3). In addition, the final agency decision of the Commission requiring the elimination of anonymous testing was affirmed.

Plaintiffs filed notice of appeal on 9 June 1995 and thereafter made a motion for stay of the judgment and continuance of the injunction. Judge Cashwell granted the motion. Respondents were ordered to continue their current program of anonymous HIV testing during appeal of this action.

The first issue presented is whether this Court or the superior court has authority to review the agency’s final decision in the instant case. Appellate review of a final agency decision is governed by N.C. Gen. Stat. § 150B-51 (1993). The proper manner of appellate review depends upon the particular issues presented. *See In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995). However, we need not specify a standard of review in this case since there is no judicial review of the exercise of an agency’s rulemaking power. *N.C. Chiropractic Assoc. v. N.C. State Bd. of Educ.*, 122 N.C. App. 122, 468 S.E.2d 539 (1996).

We note that *N.C. Chiropractic Association* had not been decided at the time the instant case was before the learned trial judge nor when the attorneys for the parties filed their briefs. *N.C. Chiropractic Association* holds that when an agency exercises its rulemaking authority by considering a rule change or amendment, subsequent procedures are governed by either N.C. Gen. Stat. § 150B-21.1 (1993 Cum. Supp.) for temporary rules, or N.C. Gen. Stat. § 150B-21.2 (1995) [§ 150B-12 (1987) was repealed and replaced by § 150B-21.2 (1995)] for permanent rules. *N.C. Chiropractic Association*, 122 N.C. App. at 124, 468 S.E.2d at 540-41.

ACT-UP TRIANGLE v. COMMISSION FOR HEALTH SERVICES

(123 N.C. App. 256 (1996))

Notably, neither of these sections provides for judicial review if the agency does not adopt or amend the rule after following the required procedures. Nor is judicial review available . . . under G.S. § 150B-43, which provides a right to judicial review for “[a]ny person who is aggrieved by the final decision in a contested case. . . .” However, G.S. § 150B-2(2) expressly excludes “rulemaking” from its definition of a “contested case.”

Id. at 124, 468 S.E.2d at 541.

Procedurally, this case is factually similar to *N.C. Chiropractic Association*. In that case, the North Carolina Chiropractic Association (NCCA) appealed from a dismissal of its petition seeking judicial review of a decision of the North Carolina State Board of Education (Board). NCCA petitioned the Board to allow chiropractic “doctors” to perform the required annual physical examinations of prospective interscholastic athletes. The Board held a public hearing and received comments on the proposed amendment. Thereafter, the Board chose not to adopt the amendment and to leave the rule unchanged. NCCA petitioned for judicial review of the Board’s decision denying the requested relief. The trial court denied and dismissed the petition since the case was not subject to review under N.C. Gen. Stat. § 150B-20(d) or § 150B-43, and because the court did not have subject matter jurisdiction. This Court affirmed.

Similarly in this case, the Commission for Health Services held an evidentiary hearing on 4 November 1994 and voted to enact a temporary rule that essentially amended the rule in effect at the time. Subsequently, the temporary rule was repealed and the Commission voted to eliminate anonymous HIV testing. Although the Commission stated that plaintiffs’ petition was “denied,” in actuality, the requested relief was denied, in part, after the exercise of the Commission’s rule-making authority.

It is regrettable that the Commission incorrectly used the phrase “petition denied” in the order dated 4 November 1994. This Court must determine the actual nature of the agency action and the manner of review of a final agency decision is not governed merely by the label placed on the assignment of error. *See State ex. rel. Utilities Comm’n v. Bird Oil Co.*, 302 N.C. 14, 21-22, 273 S.E.2d 232, 236 (1981). The petition was not actually denied because on remand a hearing was held to determine whether to change rule 15A NCAC 19A.0102(a)(3) and the Commission chose to eliminate anonymous HIV testing by adopting the temporary rule. Instead of denying the

FREEMAN v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

[123 N.C. App. 260 (1996)]

plaintiffs' petition, the Commission denied the relief requested, *i.e.*, extending anonymous HIV testing indefinitely. The agency exercised its rulemaking power on three occasions, once when it held the hearing, again when it adopted the temporary rule, and finally when it repealed that rule.

In his 12 December 1994 order, Judge Battle found that plaintiffs were the prevailing parties and awarded plaintiffs attorneys fees and other costs. This action by the trial court is indicative of the fact that the original judicial review was a "final disposition." *See* N.C. Gen. Stat. § 6-19.1 (1986). After the award of attorneys fees and costs, the instant lawsuit was concluded. Thereafter, plaintiffs should not have been allowed to amend their complaint to allege facts that occurred after the lawsuit's filing and after the entry of the orders by Judge Battle.

In conclusion, no judicial review is available when an agency exercises its rulemaking power. In the instant case, we do not have the authority to exercise the power of judicial review. Because neither the superior court nor this Court has jurisdiction for the purpose of judicial review of the final agency decision, the appeal is dismissed and the case is remanded to the superior court for dismissal of the amended complaint and petition for judicial review.

Dismissed and remanded.

Panel consisting of:

Chief Judge ARNOLD, Judges MARTIN, John C., and SMITH.

MARGARET A. FREEMAN, PARENT OF MINOR CHILD MARK FREEMAN v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, A NORTH CAROLINA CORPORATION

No. COA95-1203

(Filed 16 July 1996)

1. Retirement § 22 (NCI4th)— insurance contract not in record—applicability of ERISA undeterminable—dismissal error

Where the contract of insurance was not part of the record and there were no allegations asserting who paid the insurance

FREEMAN v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

[123 N.C. App. 260 (1996)]

premiums, it was impossible to determine from the pleadings whether the contract qualified under ERISA; therefore, it was error for the trial court to dismiss the complaint on the basis that plaintiff's claims are preempted by ERISA.

Am Jur 2d, Pensions and Retirement Funds §§ 1-98.

Right of pension plan, as entity, to bring civil enforcement action under sec. 502 of Employee Retirement Income Security Act of 1974 (29 USCS sec. 1132). 67 ALR Fed. 947.

2. Retirement § 22 (NCI4th)— ERISA claim—specificity required in complaint

Assuming the employer's group insurance benefits policy was governed by ERISA, plaintiff employee's claim against the insurance company administering the policy for failure to pay her son's medical expenses was not required to be dismissed because plaintiff failed to allege that defendant did not have the discretion to deny the claim for benefits or that defendant abused its discretion in denying the claim, since the complaint needed only to give fair notice that plaintiff was a participant in the plan seeking to recover benefits under the plan.

Am Jur 2d, Pensions and Retirement Funds §§ 1-98.**3. Parties § 12 (NCI4th)— injured minor as real party in interest—dismissal not required—substitution of parties permitted**

In an action to recover medical expenses incurred by plaintiff's son, the child is the real party in interest, and the claim must be asserted by a general or testamentary guardian or by a guardian ad litem; however, failure to appoint a guardian of any type for the child does not require dismissal of the action, since, on remand, the real party in interest must be given a reasonable opportunity to be substituted as a party plaintiff.

Am Jur 2d, Parties §§ 34 et seq.**4. Retirement § 22 (NCI4th)— ERISA action—extracontractual damages unavailable**

Extracontractual damages for pain and suffering and emotional distress and punitive damages are not remedies within the scope of ERISA.

FREEMAN v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

[123 N.C. App. 260 (1996)]

Am Jur 2d, Pensions and Retirement Funds §§ 1-98, 1230, 1231.

Right of pension plan, as entity, to bring civil enforcement action under sec. 502 of Employee Retirement Income Security Act of 1974 (29 USCS sec. 1132). 67 ALR Fed. 947.

Appeal by plaintiff from order entered 15 August 1995 in Gaston County Superior Court by Judge Robert Burroughs. Heard in the Court of Appeals 6 June 1996.

Margaret A. Freeman for plaintiff-appellant, pro se.

Cansler, Lockhart, Campbell, Evans, Bryant & Garlitz, P.A., by George K. Evans, Jr. and Thomas D. Garlitz, for defendant-appellee.

GREENE, Judge.

Margaret A. Freeman (plaintiff) appeals an Order dismissing plaintiff's claims against Blue Cross and Blue Shield of North Carolina (defendant) for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

For purposes of ruling on a motion to dismiss pursuant to Rule 12(b)(6) the allegations contained in plaintiff's complaint and amended complaint are taken as true. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

Plaintiff alleges that her minor son sustained injuries to his person which required emergency treatment and medical services at a cost of \$39,779.28. Such medical services "were covered under a group insurance benefits policy for employees of Carolina Beauty Systems," where plaintiff works. The insurance policy is through defendant, and defendant failed to pay for plaintiff's son's medical treatment despite repeated requests by plaintiff. As a result of defendant's failure to pay, plaintiff alleges that she has "suffered a mental strain and a heart condition and has been accused by the Carolina Beauty Systems of wrongdoing in order to cause her a job separation." Plaintiff requested compensatory damages in the amount of \$39,779.28, punitive damages of \$100,000.00 and a jury trial.

FREEMAN v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

[123 N.C. App. 260 (1996)]

Defendant moved to dismiss plaintiff's claims pursuant to Rule 12(b)(6) on the basis that the plaintiff's claims "are pre-empted by the Employee Retirement Income Security Act of 1974 [ERISA]." The trial court granted defendant's motion "because the claims asserted by plaintiff are preempted by . . . [ERISA], 29 U.S.C. § 1001, *et seq.*"

The dispositive issue is whether the contract of insurance referred to in the complaint is governed by ERISA.

[1] To determine the appropriateness of the dismissal of the complaint on the basis that the plaintiff's claims are preempted by ERISA first requires a determination of whether the " 'contract of insurance' referred to in [plaintiff's] complaint is governed by ERISA." *Hemphill v. Unisys Corp.*, 855 F. Supp. 1225, 1230 (D. Utah 1994). ERISA governs employee welfare benefit plans. To qualify under ERISA the plan must have three components: "(1) a contractual arrangement between the employer and the insurance company for the provision of insurance to the employer's employees; (2) an eligibility requirement of being an employee . . . ; (3) the employer's contribution of some [or] all of the insurance premiums on behalf of its employees." *Id.* at 1230-31 (quoting *Hollister v. Molander*, 744 F. Supp. 846, 847 (N.D. Ill. 1990)); *see also* 29 U.S.C.A. § 1002(1) (1985) (defining employee welfare benefit plan).

In this case the "contract of insurance" is not part of the record and there are no allegations asserting who paid the insurance premiums. It is thus impossible to determine from the pleadings whether the contract qualifies under ERISA and it was error for the trial court to dismiss the complaint on the basis that the plan did qualify under ERISA.

[2] The defendant argues that the order of dismissal must be sustained for a reason not given by the trial court, namely that the plaintiff has not alleged that the defendant "did not have the discretion to deny the claim for benefits or that [it] abused its discretion in denying the claim." We disagree. Assuming the plan to be governed by ERISA, the complaint need only give fair notice that the plaintiff is a participant in the plan seeking to recover benefits under the plan. *Hemphill*, 855 F. Supp. at 1233. It is true that the court's standard of review of the administrator's decision to grant or deny benefits is governed by the discretion, if any, given to the administrator to determine benefits eligibility. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 95 (1989). "If sufficient discretion is granted to the fiduciary by the relevant plan language, the fiduciary's

IN RE ESTATE OF MORRIS

[123 N.C. App. 264 (1996)]

interpretation of the plan will be upheld if it is reasonable.” Martin Wald & David E. Kenty, *ERISA: A Comprehensive Guide* § 7.12, at 230 (1991) (hereinafter *A Comprehensive Guide*). Otherwise, a decision denying an employee benefits under a plan must be reviewed under a *de novo* standard. *Hemphill*, 855 F. Supp. at 1235.

[3] The defendant finally argues that the dismissal should be affirmed on the grounds that the plaintiff has no standing to file the complaint, as the claim for benefits belongs to the plaintiff’s minor son. We agree that the child is the real party in interest and that the claim must be asserted by a general or testamentary guardian or by guardian ad litem, N.C.G.S. § 1A-1, Rule 17(b) (1990), and that the record does not reveal that a guardian of any type has been appointed for the child. It does not follow, however, that the action must be dismissed. On remand the real party in interest must be given a reasonable opportunity to be substituted as a party plaintiff. N.C.G.S. § 1A-1, Rule 17(a) (1990).

[4] The viability of the plaintiff’s claim for emotional distress and punitive damages depends on whether the plan is governed by ERISA. Extracontractual damages, i.e., damages for pain and suffering or emotional distress, and punitive damages are not remedies within the scope of ERISA. *A Comprehensive Guide* § 7.16, at 233.

Reversed and remanded.

Judges MARTIN, John C., and WALKER concur.

IN THE MATTER OF THE ESTATE OF: TRAVIS RAY MORRIS, DECEASED

No. COA95-126

(Filed 16 July 1996)

**Illegitimate Children § 55 (NCI4th)— illegitimate child—
acknowledgment of paternity—failure to file with clerk—
no inheritance from child through intestate succession**

By executing an affidavit of paternity under N.C.G.S. § 130A-101(f), petitioner did not constructively comply with the statutory requirements of N.C.G.S. § 29-19(b) and (c), which

IN RE ESTATE OF MORRIS

[123 N.C. App. 264 (1996)]

allow a father to inherit from an illegitimate child through intestate succession, since petitioner never filed his acknowledgment with the clerk of court, and constructive compliance has not been specifically recognized in North Carolina.

Am Jur 2d, Bastards §§ 57, 145.

Illegitimate child as “lineal descendant” and “child” within the provisions of inheritance, succession, or estate tax statutes respecting exemption and tax rates. 3 ALR2d 166.

Appeal by petitioner from judgment entered 16 May 1994 by Judge Paul Wright in Bertie County Superior Court. Heard in the Court of Appeals 26 October 1995.

Petitioner Allen Ray Morris filed this action in an attempt to share in the estate of the minor child Travis Ray Morris, deceased. Respondent Lynn Gordon Watkins gave birth to Travis on 4 March 1991. Pursuant to N.C. Gen. Stat. § 130A-101(f), petitioner and respondent, who were unmarried, executed a document on 5 March 1991 entitled “Affidavit of Parentage For Children Born Out Of Wedlock.” In the document, the parties affirmed before a notary that Travis was the natural child of petitioner and respondent. Upon execution of the affidavit, Travis’ birth certificate listed petitioner as the father.

Travis was fatally injured in an automobile crash and died 21 November 1991. Respondent qualified as administratrix of Travis’ estate and filed a wrongful death action on behalf of the estate. Respondent eventually settled the claim and received a net sum of \$104,720.69. Respondent, as administratrix, paid the entire proceeds to herself, individually, as Travis’ mother and sole heir at law. Petitioner filed this action 1 June 1993 seeking one-half of the net wrongful death proceeds. Upon filing of the petition, respondent deposited one-half of the proceeds with the Clerk of Superior Court of Bertie County.

After a hearing, the Clerk of Court denied the relief requested by petitioner. Petitioner appealed to the Superior Court, where after a *de novo* hearing, the court entered a judgment affirming the order of the Clerk. From this judgment, petitioner appeals.

IN RE ESTATE OF MORRIS

[123 N.C. App. 264 (1996)]

Joynes & Bieber, P.A., by Leonard G. Logan, Jr., for petitioner-appellant.

Overton, Jones and Carter, P.A., by Larry S. Overton and Bruce L. Daughtry, for respondent-appellee.

McGEE, Judge.

Petitioner argues that by executing an affidavit of paternity under G.S. 130A-101(f), he constructively complied with the statutory requirements of N.C. Gen. Stat. § 29-19(b) and (c), which allow a father to inherit from an illegitimate child through intestate succession. We disagree with petitioner and affirm the judgment of the trial court.

Intestate succession by and through illegitimate children is governed by G.S. 29-19. "Absent [G.S. 29-19], an illegitimate child has no right to inherit from his or her putative father." *Hayes v. Dixon*, 83 N.C. App. 52, 54, 348 S.E.2d 609, 610 (1986), *disc. review denied and appeal dismissed*, 319 N.C. 224, 353 S.E.2d 402, *cert. denied*, 484 U.S. 824, 98 L. Ed. 2d 50 (1987). Likewise, G.S. 29-19 also provides the only means by which a putative father may inherit from his illegitimate child. Pursuant to G.S. 29-19(c), the father of an illegitimate child and the father's lineal and collateral kindred may only take by and through the child for purposes of intestate succession if the father has qualified under the requirements of G.S. 29-19(b). In order to qualify under G.S. 29-19(b), the father must either: 1) have been finally adjudged to be the father of the child in an action for support brought under N.C. Gen. Stat. §§ 49-1 through 49-9 or in a civil action to establish paternity under N.C. Gen. Stat. §§ 49-14 through 49-16; or 2) must have acknowledged himself, during his own and the child's lifetimes, as the child's father in a document executed or acknowledged before a certifying officer and filed with the clerk of court in the county where either the father or child resides. Petitioner fails to qualify under either statutory requirement.

As petitioner admits, he has never been adjudged to be Travis' father. However, he contends that by acknowledging his paternity before a notary public and executing the "Affidavit Of Parentage For Child Born Out Of Wedlock," he has constructively complied with the requirements of G.S. 29-19(b)(2). Although petitioner has satisfied part of the statutory requirements, he never filed the acknowledgment with the clerk of court, and therefore did not fulfill all of the requirements. "Although we are aware of cases commenting upon

IN RE ESTATE OF MORRIS

[123 N.C. App. 264 (1996)]

constructive compliance, the doctrine has not been specifically recognized in North Carolina." *Hayes*, 83 N.C. App. at 54, 348 S.E.2d at 610. "G.S. 29-19(c) clearly and unambiguously provides that a putative father and his kindred are only entitled to inherit from an illegitimate child if paternity has been established by one of the methods prescribed in G.S. 29-19(b)." *In re Estate of Stern v. Stern*, 66 N.C. App. 507, 510, 311 S.E.2d 909, 911, *affirmed*, 312 N.C. 486, 322 S.E.2d 771 (1984), *appeal dismissed sub nom. Stern v. Weiss*, 471 U.S. 1011, 85 L. Ed. 2d 294 (1985). Because petitioner failed to establish paternity as prescribed by G.S. 29-19, he may not inherit from his illegitimate child.

Petitioner argues the General Assembly provided another method of establishing paternity by enacting G.S. 130A-101(f). He further argues that recognizing an acknowledgement of paternity under that statute as being sufficient for purposes of inheriting by, through and from illegitimate children would further the public policy of equalizing as far as practical the inheritance rights of legitimate and illegitimate children. *See Mitchell v. Freuler*, 297 N.C. 206, 254 S.E.2d 762 (1979) (this State has sought to mitigate the hardships of the former law whereby illegitimate child could only inherit from its mother and to equalize rights of legitimate and illegitimate children). Petitioner correctly points out that the majority of cases under G.S. 29-19 involve an illegitimate child attempting to inherit from his or her putative father. Petitioner argues it would be unfair to prevent a child from inheriting from his or her father and *vice versa* if the father acknowledged paternity under G.S. 130A-101(f) but failed to file the acknowledgment with the clerk of court. While there may be some merit to this argument, we remain unpersuaded.

As stated above, G.S. 29-19 provides the only means whereby illegitimate children may inherit from their putative fathers through intestate succession and the only means whereby putative fathers may inherit from their illegitimate children. When, as here, the statutory language is clear and unambiguous, there is no room for judicial construction and the court must give the statute its plain meaning without superimposing provisions or limitations not contained therein. *Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911. As this Court has recognized, G.S. 29-19 "mandates what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change." *Hayes*, 83 N.C. App. at 54, 348 S.E.2d at 610. Although not applicable to this case, we note that our General Assembly amended G.S. 130A-101(f) effective 1 October 1993, just

ENZOR v. MINTON

[123 N.C. App. 268 (1996)]

after this action was filed. The amended statute reads, in part, as follows: "The execution and filing of this affidavit [acknowledging paternity] with the registrar does not affect rights of inheritance unless the affidavit is also filed with the clerk of court in accordance with G.S. 29-19(b)(2)."

For the reasons stated, the judgment of the trial court affirming the order of the Clerk of Court is affirmed.

Affirmed.

Judges GREENE and MARTIN, Mark D. concur.

EARL W. ENZOR AND WIFE, ELIZABETH M. ENZOR, PETITIONERS v. EDWARD EARL MINTON AND WIFE, MAROLYN L. MINTON, BRANCH BANKING AND TRUST COMPANY, AND FIRST FIN, INC., TRUSTEE, RESPONDENTS

No. COA95-803

(Filed 16 July 1996)

Adverse Possession § 31 (NCI4th)— adverse possession by mistake—possession after discovery of mistake—period of possession tacked together

Where adverse possession originates in mistake but then, upon discovery of the mistake by the adverse possessor, is perpetuated by conscious intent, the uninterrupted periods of adverse possession may be tacked together and considered as one for the purpose of satisfying the prescriptive period set out in N.C.G.S. § 1-40.

Am Jur 2d, Adverse Possession §§ 84-97.

Adverse possession involving ignorance or mistake as to boundaries—modern views. 80 ALR2d 1171.

Appeal by respondents from judgment entered 10 May 1995 by Judge James D. Llewellyn in Lenoir County Superior Court. Heard in the Court of Appeals 28 March 1996.

On 14 June 1971, petitioners recorded their purchase of Lot 25 in the Westdowns Subdivision in Lenoir County. On that same day,

ENZOR v. MINTON

[123 N.C. App. 268 (1996)]

respondents predecessors in title recorded their purchase of Lot 24 in the Westdowns Subdivision. These lots are adjacent and share a common boundary line on the southernmost side of Lot 25 and the northernmost side of Lot 24. The proper location of this common boundary was properly represented on the subdivision maps, but was erroneously staked out on the ground.

Petitioners and respondents' predecessors in title both began to construct homes on their respective lots beginning in the summer of 1971. The new homes were located on the lots based on the erroneously located property line. Both homes were occupied immediately upon completion. In the summer of 1972 or 1973, respondents' predecessor in title constructed a fence along the erroneously located property line. At this time, petitioners agreed that the fence was constructed along the proper boundary line.

On 29 March 1976, respondents purchased Lot 24 and almost immediately began occupancy of the home constructed thereon. No survey was required by the lending institution in this transaction. In October of 1992, however, respondents refinanced their property and the lending institution required that a survey be performed. The survey revealed that the line was erroneously located on the ground and respondents informed petitioners of the survey's results on 3 October 1993.

From 14 June 1971 until 3 October 1993, the respective lots had been occupied and used pursuant to the erroneously located line. This occupation and use was evidenced by the regular mowing of grass, seeding, and planting and care of shrubs and trees. Petitioners continued to possess the property because of mistake until 1978 or 1980, when petitioners first discovered that the misrepresented line was not the true boundary. Upon making this discovery, petitioners decided not to tell anyone unless someone else recognized the error. Thereafter, both petitioners and respondents continued to occupy their properties as before until 3 October 1993, when respondents informed petitioners that they were aware of the error in the location of the boundary line.

On 15 February 1994, petitioners filed a petition to establish a boundary line. Title was placed in issue and the action in effect became one to quiet title. Both parties then filed motions for summary judgment, and on 10 May 1995, the trial court entered judgment in favor of petitioners. In ruling for petitioners, the trial court adopted

ENZOR v. MINTON

[123 N.C. App. 268 (1996)]

petitioners' claim that their ownership was based upon possession under known and visible lines and boundaries adversely to all persons for a period of twenty years pursuant to G.S. 1-40.

Respondents appeal.

Dees, Smith, Powell, Jarrett, Dees & Jones, by John W. Dees, for petitioner-appellees.

Harrison & Simpson, P.A., by William F. Simpson, Jr., for respondent-appellants.

EAGLES, Judge.

Respondents argue that the trial court erred as a matter of law in granting summary judgment in favor of petitioners and in failing to grant summary judgment for respondents. We disagree.

In *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985), our Supreme Court held that

when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake.

Walls, 315 N.C. at 249, 337 S.E.2d at 562. Knowing that adverse possession can be founded upon mistake, the question then becomes whether the land in question was adversely possessed for the twenty-year statutory period required by G.S. 1-40 to vest fee simple title in the adverse possessor.

Here, there is no dispute that petitioners adversely possessed the property in question for greater than the minimum statutory period. Moreover, under *Walls*, there is no dispute that the possession was adverse for the entire period. Respondents only remaining argument in light of *Walls* stems from the fact that petitioners' possession was adverse due to mistake for nearly half the statutory period and intentionally adverse for the remainder of the statutory period.

Respondents argue that the statutory period should have been restarted once petitioners realized the mistake and then retained pos-

ENZOR v. MINTON

[123 N.C. App. 268 (1996)]

session of the property with a conscious intention to ultimately claim title. Respondents' argument would not allow this later period of adverse possession to be "tacked" with the period during which petitioners' possession was adverse due to mistake. We are not persuaded. Tacking has long been accepted as a means of aggregating related periods of adverse possession into one for the purpose of satisfying the statutory minimum period necessary to ripen title in the adverse possessor. *E.g.*, *Beam v. Kerlee*, 120 N.C. App. 203, 212, 461 S.E.2d 911, 918-19 (1995) (allowing a father's period of adverse possession to be tacked with his son's period of adverse possession in an attempt to satisfy the prescriptive period), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996); *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) (recognizing that "successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."); *International Paper Co. v. Jacobs*, 258 N.C. 439, 444, 128 S.E.2d 818, 822 (1963) (tacking "the possession of an ancestor to that of the heir when there was no hiatus or interruption in the possession."). Here, there was no interruption in petitioners' adverse possession and, although not dispositive, the parties adversely possessing the land remained the same throughout the period in question.

We hold that where adverse possession originates in mistake but then, upon discovery of the mistake by the adverse possessor, is perpetuated by conscious intent, the uninterrupted periods of adverse possession may be tacked together and considered as one for the purpose of satisfying the prescriptive period set out in G.S. 1-40. *See Beam*, 120 N.C. App. at 212, 461 S.E.2d at 918-19; *Walls*, 315 N.C. at 249, 337 S.E.2d at 562. Accordingly, we affirm the order of the trial court granting summary judgment in favor of petitioners.

Affirmed.

Judges LEWIS and McGEE concur.

BYRD v. RALEIGH GOLF ASSN.

[123 N.C. App. 272 (1996)]

VICTOR G. BYRD, C. L. BYRD, RANDY L. BYRD, WILLIAM COPPAGE, PLAINTIFFS, v.
RALEIGH GOLF ASSOCIATION, INCORPORATED, DEFENDANT

No. COA95-993

(Filed 16 July 1996)

**Corporations § 137 (NCI4th)—shareholders' right to vote
conditioned upon payment of dues—relevant provision of
articles of incorporation void**

When a corporation through its articles has authorized only one class of stock, any provision in the articles of incorporation that serves to restrict the voting rights of its shareholders is void as violative of N.C.G.S. § 55-6-01(c); therefore, the relevant provisions in defendant's articles of incorporation were void to the extent that they purported to condition each shareholder's right to vote upon the payment of annual dues.

Am Jur 2d, Corporations §§ 999 et seq.

**Validity and effect of agreement controlling the vote of
corporate stock. 45 ALR2d 799.**

Appeal by plaintiffs from order entered 21 June 1995 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 24 April 1996.

Defendant Raleigh Golf Association, Inc., ("RGA") is a for-profit business corporation created and existing pursuant to Chapter 55 of the North Carolina General Statutes. Defendant RGA was incorporated in 1929, and has existed since that time for the purpose of owning and maintaining a golf facility for use by RGA members and the general public. The original articles of incorporation filed with the Secretary of State in 1929 provided for two classes of common stock, class A and class B. Class A stock held voting rights and was to be turned in each year and reissued, upon payment of annual dues, provided the stockholder remained a member of RGA. Class B stock held no voting rights and could be held without regard to the stockholder's membership status. Only those elected to membership and current in their annual dues were entitled to own class A voting stock.

In 1937, RGA's articles of incorporation were amended to provide that "[t]here shall be only one class of stock in this corporation, namely, common stock" Further, the 1937 amendments provide that

BYRD v. RALEIGH GOLF ASSN.

[123 N.C. App. 272 (1996)]

the control and operation of the corporation and the voting power shall be in the stockholders whose membership dues are paid in full for the last preceding year, and [stockholders] so voting . . . shall be known as active members of this corporation as distinguished from stockholders whose dues for the last preceding year have not been paid, who shall be known as inactive members.

The articles of incorporation were amended again in 1958, but no changes were made to this provision restricting the right to vote to those shareholders who were current on their dues.

In 1989, the RGA once more amended its articles of incorporation. These 1989 amendments, however, again left intact the voting restriction imposed upon shareholders who have not paid dues. The 1989 articles of incorporation provide in pertinent part:

In addition, the Corporation is organized for the purpose of engaging in any lawful act or activity for which corporations may be organized under Chapter 55 of the General Statutes of North Carolina.

. . . .

Section 4. The total authorized capital stock of the Corporation is one thousand (1,000) shares of Common Stock without par value. Except as set forth below, each share of Common Stock shall be entitled to one vote.

. . . .

The control and operation of the Corporation, and the voting power, shall be in the share[s] of Common Stock held by stockholders whose membership dues are paid in full for the last preceding year, which stockholders shall be known as "Active" Members or stockholders of the Corporation. Stockholders whose membership dues are not paid in full for the last preceding year shall have no right to vote, except as otherwise provided by law, the shares of Common Stock which they then hold and such stockholders shall be known as "Inactive" Members or stockholders of the Corporation.

Plaintiffs acquired their stock in RGA prior to the 1989 amendments and, not having paid their dues at that time, plaintiffs were not allowed to vote on the 1989 amendments.

BYRD v. RALEIGH GOLF ASSN.

[123 N.C. App. 272 (1996)]

In fact, all of the plaintiffs, with the exception of Victor Byrd, have not paid dues since 1988 and have been denied the right to vote since that time. Plaintiff Victor Byrd was previously inactive and unable to vote but now has paid his dues and is eligible to vote at the next shareholders' meeting. Plaintiff Victor Byrd stated, however, that he wishes again to stop paying his dues and that he believes he should not lose his voting rights when he does stop paying.

On 29 July 1994, plaintiffs filed a verified complaint against defendant alleging numerous violations of the provisions of the North Carolina Business Corporation Act. Plaintiff sought declaratory relief in the form a permanent injunction against defendant RGA to prevent any future restriction on plaintiffs' right to vote their shares in RGA. On 20 February 1995, plaintiff filed a motion for summary judgment. Plaintiffs' motion was heard on 7 April 1995 and at that time the parties stipulated that no genuine issue of material fact exists. On 21 June 1995, Judge Stafford G. Bullock entered an order denying plaintiffs' motion and granting summary judgment in favor of defendant RGA.

Plaintiffs appeal.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Christopher B. Capel, for plaintiff-appellants.

Manning, Fulton & Skinner, P.A., by Howard E. Manning, Jr., and Kristen G. Lingo, for defendant-appellee.

EAGLES, Judge.

Plaintiffs first argue that the trial court erred in granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment. Plaintiffs argue that summary judgment is appropriate in their favor because of the requirement set out in G.S. 55-6-01(c)(1) that a corporation provide to its shareholders at least one class of stock with "unlimited voting rights." G.S. 55-6-01(c)(1) (1989). We agree.

The plain language of G.S. 55-6-01(c) provides that RGA's "articles of incorporation *must* authorize . . . [o]ne or more classes of shares that together have unlimited voting rights" G.S. 55-6-01(c) (emphasis added). This language is mandatory and subject to no

BYRD v. RALEIGH GOLF ASSN.

[123 N.C. App. 272 (1996)]

exception. It follows then that, when a corporation through its articles has authorized only one class of stock, any provision in the articles of incorporation that serves to restrict the voting rights of its shareholders is void as violative of G.S. 55-6-01(c).

Here, the defendant's articles of incorporation condition the exercise of voting rights upon the payment of annual dues to the corporation. Such an arrangement might well be permissible were plaintiffs members of a nonprofit corporation organized pursuant to Chapter 55A. *See* G.S. 55A-3-02 (1993); G.S. 55A-2-02 (1993); G.S. 55A-6-01 (1993); G.S. 55A-6-20 (1993); G.S. 55A-6-21 (1993); G.S. 55A-6-23 (1993). Defendant correctly admits in its brief, however, that it is a "for-profit, business corporation, existing under Chapter 55 of the laws of the State of North Carolina." A for-profit corporation may limit or attach conditions to the voting rights of different classes of its shares pursuant to G.S. 55-6-01(d)(1), but only so long as it first maintains a class of shares with unfettered voting rights. The mandatory requirements of G.S. 55-6-01(c) remain controlling.

We conclude that the relevant provisions in defendant's articles of incorporation are void to the extent that they purport to condition each shareholder's right to vote upon the payment of annual dues. We reverse the trial court's entry of summary judgment for defendant and remand the cause with direction to the trial court to enter summary judgment in favor of plaintiffs. Since this opinion removes any legal bar to plaintiffs' unfettered exercise of their voting rights, injunctive relief should be unnecessary absent a further showing by plaintiffs that their voting rights remain restricted in some way by defendant. We need not address plaintiffs' remaining assignments of error.

Reversed and remanded.

Judges LEWIS and McGEE concur.

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

STATE OF NORTH CAROLINA v. JAMIE LAMONT WEAVER, AND GARY WILLIAMS,
DEFENDANTS

No. COA95-782

(Filed 6 August 1996)

1. Kidnapping and Felonious Restraint § 18 (NCI4th)— victim moved as part of another felony—no removal or restraint sufficient to constitute kidnapping

The trial court erred in failing to dismiss the charge of kidnapping against both defendants where it was necessary for defendants to move the victim from a parking lot to her hotel room in order to effectuate their robbery because the victim's car keys and money were in the hotel room; defendants moved the victim only as far as necessary to complete the robbery and promptly released her; and there was thus no restraint or removal more than that which was an inherent, inevitable part of the commission of another felony. N.C.G.S. § 14-39.

Am Jur 2d, Abduction and Kidnapping § 32.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

2. Criminal Law § 793 (NCI4th)— acting in concert—insufficient findings of intent required—instructions erroneous

The trial court erred in its instructions regarding the doctrine of acting in concert where the court charged that, if the jury should find from the evidence and beyond a reasonable doubt that defendant either acted by himself or acted together with named persons to commit the essential elements of the crimes charged, then it would be the jury's duty to return a verdict of guilty since those instructions allowed the jury to convict defendant of specific intent crimes without requiring the State to establish that defendant had the specific intent to commit those crimes.

Am Jur 2d, Trial §§ 1251, 1253.**3. Criminal Law § 793 (NCI4th)— acting in concert—erroneous instructions—defendant prejudiced on three of four charges**

Though the trial court erred in its instructions on acting in concert, and one defendant was prejudiced by those instructions

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

on the charges of robbery with a dangerous weapon, felonious breaking or entering, and conspiracy because there was no evidence that defendant agreed to or was even aware of the plan to point a gun at the victim to force her to turn over her keys and money, such defendant was not prejudiced by the instruction on the charge of attempted larceny where there was sufficient evidence to show that he had the requisite intent permanently to deprive a car owner of it use, and it was unlikely that a different result would have been reached had the instructions been correctly given.

Am Jur 2d, Trial § 1142.

4. Criminal Law § 793 (NCI4th)— acting in concert—erroneous instructions—defendant not prejudiced

The trial court's erroneous instructions on acting in concert were not prejudicial to one defendant on the charges of robbery with a dangerous weapon, felonious breaking or entering, breaking or entering with intent to commit armed robbery, and attempted larceny where there was sufficient evidence to show that defendant was an active participant in every step of planning the crimes, and there was no a reasonable likelihood that a different result would have occurred at trial had the jury been instructed correctly.

Am Jur 2d, Trial § 1142.

Supreme Court's views as to prejudicial effect in criminal case of erroneous instructions to jury involving burden of proof or presumptions. 92 L. Ed. 2d 862.

5. Criminal Law § 314 (NCI4th)— defendant's statements admissible against codefendant—joinder proper

The trial court did not err in allowing the State's motion to join both defendants for trial, since statements by one defendant about the circumstances surrounding the attempted theft of a car were admissible against the other defendant, and no objection or request for limiting instruction was made with respect to the testimony. N.C.G.S. § 15A-926(b)(2)(a).

Am Jur 2d, Actions §§ 136, 137.

What constitutes statement against interest admissible under Rule 804(b)(3) of Federal Rules of Evidence. 34 ALR Fed. 412.

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

6. Indictment, Information, and Criminal Pleadings § 55 (NCI4th)—minor difference between indictment and evidence—no fatal variance

There was no fatal variance between the indictment and proof where defendant was charged with attempted larceny of a car from “Finch-Wood-Chevrolet-Geo, Inc.,” and the evidence showed that Finch-Wood Chevrolet had custody of the car, but the evidence did not show that Finch-Wood was incorporated or that Finch-Wood Chevrolet was also known as Finch-Wood Chevrolet-Geo, since defendant did not demonstrate or argue that any prejudice resulted from the minor difference between the indictment and the evidence at trial.

Am Jur 2d, Indictments and Informations § 273.

Appeal by defendants-appellants from judgments entered 24 February 1995 by Judge Frank R. Brown in Halifax County Superior Court. Heard in the Court of Appeals 26 March 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Jill Ledford Cheek, for the State.

Hux, Livermon & Armstrong, by James S. Livermon, Jr., for defendant-appellant Weaver.

Law Office of Jimmie R. “Sam” Barnes, by Laura-Jean Alford, for defendant-appellant Williams.

WYNN, Judge.

On 25 July 1994, defendants Jamie Lamont Weaver (“Weaver”) and Gary Williams (“Williams”), along with Barry McNeil (“McNeil”) and Teddy Taylor (“Taylor”) drove to the ACME-Oldsmobile Cadillac dealership in Roanoke Rapids, North Carolina in a car owned by Weaver. There, following their unsuccessful attempt to start a car belonging to the dealership, Weaver and Williams broke the window of a 1993 Cadillac owned by another dealership, and attempted to “hot wire” it. They were unsuccessful in doing so.

The next day, during the evening hours, Weaver, Williams and Taylor, along with Lonzy Barber (“Barber”) drove to a Holiday Inn in Roanoke Rapids, whereupon they agreed to steal one of two Ford Explorers in the hotel parking lot. They saw a woman (later identified as Ms. Cynthia Figueroa) enter and exit one of the Explorers. After

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

determining that both Explorers had alarms, Weaver suggested that it would be easier for them to take Ms. Figueroa's keys to her vehicle than to hot wire the other Explorer.

Thereafter, they followed Ms. Figueroa in Weaver's car while she drove to two different hotels. Ms. Figueroa eventually returned to the Holiday Inn. While she checked in that hotel, Williams, Taylor and Barber watched her from Weaver's car, and Weaver watched from a pay phone nearby. During that time, Williams suggested pointing a gun at Ms. Figueroa to force her to give up her keys and money. Barber and Taylor objected; nonetheless, Williams took out a shotgun and gave a handgun to Taylor.

When Ms. Figueroa returned to her Explorer, Taylor approached her and after a brief interchange, pointed the handgun at her and demanded her money and the keys to the Explorer. Ms. Figueroa replied that her money and keys were in her hotel room, right in front of the Explorer. Taylor instructed her to go to the room, which was occupied by her two young children. After he entered the room with Ms. Figueroa, Williams followed, wearing a mask.

Once inside the room, Williams began to remove his belt. Ms. Figueroa asked Williams not to hurt her, stating that they could have anything they wanted. She gave her money to either Taylor or Williams. At that time, one of the men told her, "If you call the police, we'll kill you." Ms. Figueroa then handed the keys to her Explorer to Taylor and the two men ran to the Explorer and drove away in it. Ms. Figueroa called the front desk, and an employee of the Holiday Inn called the police, who arrived a short time later.

Meanwhile, Williams and Taylor drove to Garysburg, North Carolina, where they rejoined Weaver and Barber. Together, the four men rode North on Interstate 95 in the Explorer where they were soon followed by a police vehicle. They crossed the state line into Virginia, then exited I-95 with the police car still following them. Upon noticing that the police car had its blue light and siren on, Weaver sped up, but was forced to stop when the Explorer came to a rocky area and hit a piece of wood. They exited the Explorer, split up, and ran into the woods.

The next day, Weaver and Barber were apprehended by police officers when they attempted to take a cab from Virginia to North Carolina. On 28 July 1994, Taylor confessed to the events at the Holiday Inn.

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

Defendants Weaver and Williams were indicted on charges of conspiracy to commit robbery with a dangerous weapon, first degree burglary, robbery with a dangerous weapon, second degree kidnapping, and attempted larceny. Both men were convicted of all charges, and sentenced to twenty-five years for second degree kidnapping, five years for felonious breaking or entering, and thirty years for robbery with a firearm, the sentences to be served consecutively. In addition, both men were sentenced to concurrent terms of ten years for felonious conspiracy, and two years for attempted larceny. From these judgments and commitments, defendants appeal.

The issues on appeal are whether the trial court erred by: (I) Denying both defendants' motions to dismiss their kidnapping charge; (II) submitting, as to both defendants, an incorrect jury instruction relating to the doctrine of acting in concert; (III) allowing, over defendant Williams' objection, the joinder of trials for Williams and Weaver; and (IV) failing to dismiss the charge of attempted larceny against defendant Weaver. We find no prejudicial error in part, vacate in part and reverse in part.

I.

[1] Both defendants contend that the trial court erred by failing to grant their motions to dismiss the charge of kidnapping. They argue that under precedent from the Supreme Court of North Carolina, their actions during the robbery were not sufficient to support a kidnapping charge. We are constrained to agree that our Supreme Court case law requires this result.

N.C. Gen. Stat. § 14-39 (Supp. 1995) sets forth the essential elements of kidnapping. That section states:

a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C.G.S. § 14-39. The State's indictments in this case charged both defendants with kidnapping Cynthia A. Figueroa for the purpose of facilitating the commission of a felony, to-wit: robbery with a dangerous weapon.

In *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), our Supreme Court held that a conviction for kidnapping requires restraint or removal more than that which is an inherent, inevitable part of the commission of another felony. *Id.* at 102-03, 282 S.E.2d at 446. Our Supreme Court construed N.C.G.S. § 14-39 in this manner so as to avoid "punish[ing a defendant] twice for essentially the same offense, violating the constitutional prohibition against double jeopardy." *Id.* at 102, 282 S.E.2d at 446.

The facts in *Irwin* were as follows:

[The defendant] forced [the victim] at knifepoint to walk from her position near the fountain cash register to the back of the store in the general area of the prescription counter and safe. During this time two shots were fired by [a co-defendant] at the front of the store, causing [defendant] to flee. [The victim] was not touched or further restrained. All movement occurred in the main room of the store.

Id. at 103, 282 S.E.2d at 446. The defendant in *Irwin* forced the victim toward the back of the store in order to enable her to go to the prescription counter and open the safe. *Id.*

In determining whether the restraint present in a given case is more than that which is an inherent or inevitable part of another felony, "[t]he key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or 'subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.'" *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994) (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446).

The *Irwin* Court reversed the defendant's conviction for kidnapping because it was necessary for the defendant to move the victim in order to complete the felony of armed robbery. The *Irwin* Court stated:

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

[The victim's] removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish defendant's objective of obtaining drugs it was necessary that [a store employee] go to the back of the store to the prescription counter and open the safe. Defendant was indicted for the attempted armed robbery of [the two store employees]. [The victim's] removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.

Irwin, 304 N.C. at 103, 282 S.E.2d at 446.

In *State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991), *disc. review denied*, 331 N.C. 120, 414 S.E.2d 764 (1992), this Court upheld the denial of defendant's motion to dismiss the kidnapping charges against him. In *Joyce*, the facts were as follows:

All victims in the case at bar were moved from one room to another room where they were confined. The removals were not an integral part of the crime nor necessary to facilitate the robberies, since the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken.

Id. at 567, 410 S.E.2d at 521. The *Joyce* Court distinguished *Irwin* on the ground that the victims in *Joyce* did not need to be moved in order to complete the underlying robbery, as they did in *Irwin*. *Id.*

We find the case *sub judice* to be more closely akin to *Irwin* than *Joyce*. In the instant case, Taylor pointed a gun at Ms. Figueroa and demanded her car keys and her money. When Ms. Figueroa told Taylor that her keys and money were in her hotel room, it became necessary for her to enter the hotel room to retrieve them in order for the planned robbery to be completed. Upon leading Ms. Figueroa into her hotel room at gunpoint, the men took the keys and money from Ms. Figueroa and quickly left. There is no indication in the record that Ms. Figueroa was forcibly moved to her room for any reason other than to complete the underlying robbery. And, while the record indicates that Williams unbuckled his belt in the hotel room, this action alone requires too much of a leap in inference to conclude that Ms. Figueroa was exposed to a greater danger than that inherent in the robbery. As in *Irwin*, it was necessary for the defendants to move the victim in order to effectuate their robbery, because the desired property was elsewhere. As in *Irwin*, the defendants moved the victim only as far as necessary to complete the robbery, and promptly

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

released her. As a result, we find *Irwin* controlling, and hold that the trial judge erred in denying both defendants' motion to dismiss the kidnapping charges. As in *Irwin*, we must reverse both defendants' convictions on the charge of kidnapping.

II.

[2] Both defendants next contend that the trial court erred in its instructions to the jury regarding the doctrine of acting in concert. We agree and hold that this error requires us to vacate certain of Weaver's convictions, but none of defendant Williams' convictions.

Again, we are guided by case law from our Supreme Court. In *State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996), the trial court, before instructing the jury on the substantive elements of each of the crimes charged, defined acting in concert as follows:

Now, there's a principle in our law known as acting in concert. For a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principle [sic] if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural or probable consequence of the common purpose.

However, the mere presence of the defendant at the scene of a crime, even though he is in sympathy with a criminal act and does nothing to prevent its commission, does not make him guilty of the offense. To sustain a conviction of the defendant, the State's evidence must show and prove to you that the defendant was present actually or constructively with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary, and that such intent was . . . communicated to the actual perpetrator.

Id. at 625-26, 466 S.E.2d at 279-80.

Within the instructions on the essential elements of first degree murder, robbery with a dangerous weapon, and kidnapping, the trial court in *Straing* included the following instruction: "[The State must prove beyond a reasonable doubt] that the defendant, *or someone with whom he was acting in concert*, [committed each of the essential elements of the charged offenses]." *Id.*

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

On appeal, our Supreme Court in *Straing* found error in this instruction stating:

A premise of our criminal law is that no person charged with a crime will be held criminally responsible unless the State proves beyond a reasonable doubt that the person possessed the *mens rea* or mental state forming an element of the crime charged. One substantive element of numerous offenses in this state is that the person charged possessed "specific intent" to commit the very crime for which the person is charged. Our legislature has included a specific intent element in each of the offenses of which defendant in the case *sub judice* was found guilty Thus, before the jury could properly render a verdict of guilty as to any of these specific intent crimes, it was required to find that defendant possessed the requisite specific intent.

Id. at 626-27, 466 S.E.2d at 280.

Regarding the doctrine of acting in concert, the Court in *Straing* stated:

[Under the doctrine of acting in concert], each person acting pursuant to a common plan may be criminally responsible for all offenses that are a part of the course of criminal conduct pursuant to the common plan, even if each person does not commit the act or acts himself [T]he theory of acting in concert does not dispense with the requirement that the State prove that the defendant had the specific intent to commit the particular offense for which he is charged.

Id. at 627, 466 S.E.2d at 280; *State v. Blankenship*, 337 N.C. 543, 559, 447 S.E.2d 727, 736 (1994).

The *Straing* Court held that the instructions given did not require the State to prove the specific intent of each crime, and allowed the jury to convict the defendants without proving beyond a reasonable doubt that each defendant possessed the requisite specific intent. The *Straing* Court vacated the defendant's convictions on all specific intent charges. *Straing*, 342 N.C. at 627, 466 S.E.2d at 281.

In the instant case, the trial court in language quite similar to that in *Straing*, instructed the jury on acting in concert as follows:

The Court instructs you that for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons are acting together

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

in pursuance of a common plan and common purpose to rob, and one or more of them actually does the robbery, all would be equally guilty within the meaning of the law.

If two or more persons join in a purpose to commit a crime, each of them, if actually or constructively present is not only guilty as a principal if one or more commits that particular crime, but he's also guilty of any other crime committed by another in pursuance of a common purpose, that is the common plan to rob [sic] was a natural or probable consequence thereof.

Thereafter, the trial judge instructed the jury on the essential elements of kidnapping in relevant part as follows:

As to the defendant Gary Williams, I charge that if you find from the evidence and beyond a reasonable doubt that on July 26, 1994, *the defendant acting either by himself or acting together with Jamie Weaver, or Lonzy Barber, or Teddy Taylor* [committed the essential elements of kidnapping], *it would be your duty to return a verdict of guilty* of kidnapping.

(emphasis supplied). An identical instruction for defendant Weaver on the crime of kidnapping followed, substituting Weaver's name for Williams, and Williams' name for Weaver. Following instructions on the essential elements of the other crimes charged, the trial court inserted language virtually identical to the language italicized above.

In *Straing*, our Supreme Court held that the jury instructions given by the trial court constituted reversible error because the instructions allowed the jury to convict the defendant of specific intent crimes "without requiring the State to establish that the defendant had the specific intent to commit those crimes." *Id.* Similarly, the instructions in the case at bar allowed the jury to convict Weaver and Williams without finding that they had the specific intent to commit the crimes they were charged with.

Defendants were convicted of felonious conspiracy to commit robbery with a dangerous weapon, first degree burglary, robbery with a dangerous weapon, second degree kidnapping, and attempted larceny. Each of these are specific intent crimes. *See, e.g., State v. Surrett*, 109 N.C. App. 344, 348, 427 S.E.2d 124, 126 (1993) (kidnapping); *State v. Attmore*, 92 N.C. App. 385, 395, 374 S.E.2d 649, 656 (1988), *disc. review denied*, 324 N.C. 248, 377 S.E.2d 757 (1989) (robbery with a dangerous weapon); *State v. Gay*, 334 N.C. 467, 486, 434 S.E.2d 840, 851 (1993) (felonious breaking or entering); *State v.*

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

Brayboy, 105 N.C. App. 370, 374, 413 S.E.2d 590, 593 (1992) (holding that any attempt crime requires specific intent). As in *Straining*, the jury instructions regarding acting in concert constituted error. However, to merit a new trial, each defendant must establish prejudice by showing that there is a reasonable possibility that “had the instructional error on acting in concert not occurred, a different result would have been reached [at trial].” *Blankenship*, 337 N.C. at 562, 447 S.E.2d at 738-39; N.C. Gen. Stat. § 15A-1443(a) (1988).

A. Defendant Weaver

[3] Defendant Weaver contends that he was prejudiced by the trial court’s erroneous failure to give his requested jury instructions on the charges of: (1) Robbery with a dangerous weapon; (2) felonious breaking or entering; (3) conspiracy; and (4) attempted larceny. We agree as to the first three of these charges, and therefore vacate his convictions and remand for a new trial. We, however, find no prejudicial error as to his conviction on attempted larceny.

The State’s evidence tended to show that defendant Weaver was not present when Williams first suggested to Taylor and Barber that they point a gun at Ms. Figueroa in order to ensure that she gave them her car keys and money. Although it was Weaver who checked the Explorers to see if they had alarms and first suggested to the group that it would be easier to take Ms. Figueroa’s keys than to hot wire the Explorer, there is no evidence to suggest that he agreed, either explicitly or implicitly, with the plan, advanced by Williams, to point the gun at Ms. Figueroa in order to force her to turn over her keys and money. Indeed there is no evidence in the record that Weaver was even aware of the fact that a gun would be used. Instead, the evidence shows that Weaver acted as a lookout to determine when Ms. Figueroa left the hotel, and was not present when Williams suggested the group point a gun at Ms. Figueroa. In addition, the evidence shows that immediately before the robbery, Weaver, without knowledge of the plan to point a gun at Ms. Figueroa, moved away from the others and pointed out Ms. Figueroa’s location to the group. In short, the evidence indicates that Weaver helped plan the robbery, but does not indicate he approved of, or was even aware of, the plan to point a gun at Ms. Figueroa.

We find that the evidence in this case, as in *Blankenship*, is close. Thus, because of the error in the trial court’s instruction on acting in concert, the jury’s findings of guilt on robbery with a dangerous weapon, felonious breaking and entering and conspiracy cannot

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

stand. *Blankenship*, 337 N.C. at 562, 447 S.E.2d at 738-39. Since there is a reasonable possibility that a different result would have been reached at trial had the instructions been correctly given, we must vacate Weaver's convictions on these charges. *Id.*

We, however, reach a contrary conclusion as to Weaver's conviction on the charge of attempted larceny. The essential elements of attempted larceny are: (1) An intent to take and carry away the property of another; (2) without the owner's consent; (3) with the intent to deprive the owner of his or her property permanently; (4) an overt act done for the purpose of completing the larceny, going beyond mere preparation; and (5) falling short of the completed offense. *See State v. Lively*, 83 N.C. App. 639, 351 S.E.2d 111 (1986), *disc. review denied*, 319 N.C. 461, 356 S.E.2d 10 (1987); *State v. McAlister*, 59 N.C. App. 58, 295 S.E.2d 501 (1982), *disc. review denied*, 307 N.C. 471, 299 S.E.2d 226 (1983).

The evidence supporting Weaver's conviction of attempted larceny stems from his conduct on the day before the incident with Ms. Figueroa. On that day, Taylor, McNeil, Williams, and Weaver attempted to steal a Cadillac belonging to Finch-Wood Chevrolet. Taylor testified regarding the attempt to steal the Cadillac as follows:

When we first got [to the dealership], [Weaver and Williams] . . . said they was [sic] going to the car and see, you know [sic], did the car have an alarm on it . . . [Weaver and Williams] walked to the cars . . . [then] came over to [where McNeil and I were] and told us they couldn't—[Weaver] said he couldn't get the car started because the car had some kind of lock on it or something, he was going to keep trying, you know, so he could try to break it. Then after [Weaver and Williams] went back over there . . . we got to the back of the car where they was at [sic], both of 'em was [sic] in one car, [Williams] was in the back seat of a Cadillac and [Weaver] was in the front under the steering-wheel with a screw-driver or hammer or something. And then the window back glass was broken out and then we was like what's going on [sic], what's taking so long

According to Taylor's testimony, Weaver was an active participant in the attempt to steal the Cadillac, and was fully aware of the group's plan to take the Cadillac from its rightful owner and permanently deprive the owner of the car. As a result, if the jury believed Taylor's testimony, it could find that Weaver had the requisite specific intent to take and carry away the car with the intent to permanently deprive

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

the owner of its use. Had the jury disbelieved Taylor's testimony regarding the Cadillac it would have acquitted Weaver of attempted larceny. We find it highly unlikely that the jury believed Taylor's testimony, yet also believed that Weaver did not share the specific intent to steal the car. We therefore conclude that there is not a reasonable possibility that a different result would have been reached at trial had the instructions been correctly given. Accordingly, we find no prejudicial error regarding Weaver's conviction on attempted larceny.

B. Defendant Williams

[4] Defendant Williams contends that *Blankenship* and *Straing* require reversal of his remaining convictions. We disagree.

Williams first assigns error to the instructions relating to robbery with a dangerous weapon. Robbery with a dangerous weapon requires showing "the specific intent to unlawfully deprive another of personal property by *endangering or threatening his life with a dangerous weapon.*" *State v. Davis*, 340 N.C. 1, 12, 455 S.E.2d 627, 632, *cert denied*, — U.S. —, 133 L. Ed. 2d 83 (1995) (emphasis supplied).

Unlike Weaver, Williams was an active participant in every step of the planning of the robbery. The record indicates that Williams first suggested to Taylor and Barber that the men display a gun to force Ms. Figueroa to give them her keys and money. The record also indicates that Williams supplied a handgun for Taylor, and brought a sawed-off shotgun for himself.

That the jury convicted Williams of robbery with a dangerous weapon indicates that it believed the testimony of Taylor and Ms. Figueroa. Given the evidence in the record, it is unlikely that the jury could have believed Taylor's testimony, and the other evidence presented in the case, and not found that Williams had the specific intent to use a deadly weapon, due to his extensive role in the planning of the robbery. Accordingly, we find that there is not a reasonable likelihood that a different result would have occurred at trial had the jury been instructed correctly. We, therefore, find no prejudicial error in the trial court's instructions on defendant Williams' charge of robbery with a dangerous weapon.

Similarly, as to the charge of felonious breaking or entering against Williams, the State was required to show the specific intent to commit any felony or larceny therein. *State v. Gray*, 322 N.C. 457, 460, 368 S.E.2d 627, 629 (1988).

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

The State's indictment charged Williams with breaking or entering Ms. Figueroa's hotel room with the intent to commit armed robbery. As a result, the State was required to prove that Williams broke or entered Ms. Figueroa's hotel room with such intent.

As previously stated, Williams' role in the robbery of Ms. Figueroa was different from that of Weaver. If the testimony of Taylor and Ms. Figueroa is believed, Williams did, in fact, enter Ms. Figueroa's hotel room with the intent of committing the felony of armed robbery therein. By convicting Williams of the crime of breaking or entering, the jury demonstrated that it believed the testimony of Taylor and Ms. Figueroa. As a result, we find that there is not a reasonable likelihood that a different result would have occurred at trial had the jury been instructed correctly. This assignment of error is overruled.

Finally, Williams assigns error to the jury instructions on the charge of attempted larceny. For the reasons stated above regarding Weaver's assignment of error concerning the jury instructions on the attempted larceny charge, we find that there is not a reasonable possibility that a different result would have occurred at trial had the jury been correctly instructed. We find no prejudicial error in his conviction on this charge.

III.

[5] Defendant Williams next contends that the trial court erred by allowing the State's motion to join Williams and Weaver for trial. We disagree.

N.C.G.S. § 15A-926(b)(2)(a) authorizes joinder of defendants where the state seeks to hold each defendant accountable for the same crimes. *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987). The trial court must grant severance, however, when necessary to ensure that a defendant receives a fair trial. *Id.*; N.C.G.S. § 15A-927(c)(2). The decision whether to grant the State's motion to try co-defendants jointly will not be disturbed absent an abuse of discretion. *Id.*

Williams contends that he was prejudiced by being tried jointly with Weaver because evidence was admitted which was admissible against Weaver but inadmissible against him. We disagree.

The evidence Williams complains of related to events leading up to the attempted theft of the Cadillac. Taylor testified that Weaver had discussed stealing a car in his presence, and that Weaver told him that he knew how to hot wire cars. Taylor further testified that Weaver

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

told him that they could take a stolen car to New York where Weaver's cousin could sell it.

Williams contends that these statements were inadmissible as to him. We disagree.

Evidence which tends to shed light on the events surrounding the commission of a crime is admissible. *State v. Morston*, 336 N.C. 381, 400, 445 S.E.2d 1, 11 (1994); *State v. Meekins*, 326 N.C. 689, 695-96, 392 S.E.2d 346, 349 (1990). Thus, Taylor's testimony regarding Weaver's desire to steal a car and the fact that Weaver knew how to hot wire cars was admissible to describe the circumstances surrounding the attempted theft of the Cadillac. In addition, in order for Williams to complain that this testimony was inadmissible as to him, he is required to object to the introduction of the evidence, or request a limiting instruction. Williams did neither. Since the evidence was admissible against Weaver, it was not error for the State to introduce the evidence against Williams absent an objection or request for a limiting instruction. *See State v. Coffey*, 326 N.C. 268, 286, 389 S.E.2d 48, 59 (1990), *appeal after remand*, 336 N.C. 412, 444 S.E.2d 431 (1994) (holding that admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions).

We have examined defendant Williams' remaining assignments of error, and find them to be without merit.

IV.

[6] Defendant Weaver next contends that the trial court erred by refusing to dismiss the charge of attempted larceny when there was a fatal variance between the evidence at trial and the allegations in the indictment.

This contention is not properly before this Court. Weaver's assignment of error number eleven states that he assigns as error the following:

11. Denial of Defendant-Appellant Weaver's motion to dismiss the charge of attempted larceny in the indictment in Case No. 94 CrS 6407, on the ground that the evidence admitted at trial was insufficient to permit a reasonable juror to find that the State had proven all of the elements of this offense as charged in the indict-

STATE v. WEAVER

[123 N.C. App. 276 (1996)]

ment against Defendant-Appellant Weaver beyond a reasonable doubt

This assignment of error does not allege a variance between the indictment and the proof at trial. Rather, this assignment of error challenges the sufficiency of the evidence.

N.C. R. App. P. 10(a) (1996) states:

Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10

Weaver did not set out this argument in an assignment of error in the record. Thus, this issue is not properly before this Court. However, in the exercise of our discretion under Rule 2 of the Rules of Appellate Procedure, we elect to address Weaver's contention.

The indictment which charged Weaver with attempted larceny charged that he did "attempt to steal, take and carry away a 1993 Cadillac . . . the personal property of Finch-Wood Chevrolet-Geo Inc." At trial, the State's evidence did not show that the person which had custody and control of the car, identified as Finch-Wood Chevrolet, was incorporated. In addition, there was no testimony that Finch-Wood Chevrolet was also known as Finch-Wood Chevrolet-Geo.

In general, a variance between the indictment and the proof at trial does not require reversal unless the defendant is prejudiced as a result. *State v. Christopher*, 307 N.C. 645, 649-50, 300 S.E.2d 381, 384 (1983).

This Court has required that a defendant demonstrate that he or she was misled by a variance, or hampered in his/her defense before this Court will consider the variance error. *State v. Summerford*, 65 N.C. App. 519, 524-25, 309 S.E.2d 553, 557 (1983), *disc. review denied*, 310 N.C. 311, 312 S.E.2d 654 (1984).

In the instant case, Weaver cannot demonstrate, nor does he argue, that any prejudice resulted from the minor difference between the indictment and the evidence at trial. Accordingly, this assignment of error is overruled.

We have examined both defendants' remaining assignments of error, and find them to be wholly without merit.

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

Conclusion

The result is: We reverse the kidnapping convictions against both defendants; find no prejudicial error against Weaver on the conviction of attempted larceny and vacate all remaining charges against him; find no prejudicial error on all remaining charges against Williams.

DEFENDANT WEAVER:

Second degree kidnapping (No. 94 CRS 6405): Reversed.

Attempted larceny (No. 94 CRS 6407): No prejudicial error.

Felonious breaking or entering (No. 94 CRS 6403): New trial.

Robbery with a firearm (No. 94 CRS 6404): New trial.

Felonious conspiracy (No. 94 CRS 6402): New trial.

DEFENDANT WILLIAMS:

Second degree kidnapping (No. 94 CRS 6199): Reversed.

Attempted larceny (No. 94 CRS 7303): No prejudicial error.

Felonious breaking or entering (No. 94 CRS 6200): No prejudicial error.

Robbery with a firearm (No. 94 CRS 6201): No prejudicial error.

Felonious conspiracy (No. 94 CRS 6202): No prejudicial error.

Judges JOHNSON and WALKER concur.



STATE OF NORTH CAROLINA v. ROBERT CHARLES JOHNSTON, DEFENDANT

No. COA95-1137

(Filed 6 August 1996)

1. Obscenity, Pornography, Indecency, or Profanity § 16 (NC14th)— jury instructions on two magazines—right to unanimous jury verdict not abridged

In a prosecution of defendant for disseminating obscene material, the trial court did not err in refusing to instruct the jury

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

that there must be unanimous agreement that at least one of the two magazines purchased by a detective was obscene, and this refusal did not violate defendant's right to a unanimous jury verdict, since the situation in this case involved alternative methods of establishing a single offense rather than two separate offenses.

Am Jur 2d, Lewdness, Indecency and Obscenity § 39.**2. Obscenity, Pornography, Indecency, or Profanity § 13 (NCI4th)— contemporary community standards—evidence unnecessary**

In a prosecution of defendant for disseminating obscene material, evidence of what constituted "contemporary community standards" was unnecessary.

Am Jur 2d, Lewdness, Indecency and Obscenity § 34.**Modern concept of obscenity. 5 ALR3d 1158.****3. Obscenity, Pornography, Indecency, or Profanity § 14 (NCI4th)— defendant's knowledge of content of materials disseminated—sufficiency of evidence**

In a prosecution for dissemination of obscene material, there was sufficient circumstantial evidence that defendant knew the character and the content of the materials to be distributed.

Am Jur 2d, Lewdness, Indecency and Obscenity § 34.**Modern concept of obscenity. 5 ALR3d 1158.****4. Obscenity, Pornography, Indecency, or Profanity § 18 (NCI4th)— dissemination of obscenity—definition of prurient—jury instruction proper**

The trial court's definition of a prurient interest in sex as "an unhealthy, abnormal, lascivious, shameful or morbid sexual interest" could not be understood by the jury to include a normal interest in sex and was therefore appropriate in this prosecution for dissemination of obscene magazines; furthermore, the trial court's instruction that the jury should apply the "current standards" in the community rather than the standards at the time of the incident was harmless error, and there was no error in the court's instruction that the jury could infer that defendant had knowledge of the nature and content of the magazines based on circumstantial evidence.

Am Jur 2d, Lewdness, Indecency and Obscenity § 39.

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge. 92 ALR3d 866.

5. Obscenity, Pornography, Indecency, or Profanity § 15 (NCI4th)— closing argument—propriety

The prosecutor's closing argument in a prosecution of a store clerk for disseminating obscenity asking jurors to consider how they would feel if their mothers saw them looking at allegedly obscene magazines and suggesting that any defense that the State should go after the store owners rather than the clerk was like arguing against going after street-level drug dealers did not expand the definition of "prurient" or equate defendant with a drug dealer. Rather, the prosecutor merely used analogies which the jurors were free to reject or ignore in order to illustrate his message.

Am Jur 2d, Lewdness, Indecency and Obscenity §§ 31-40.

6. Jury § 187 (NCI4th)— refusal to excuse juror for cause— defendant's failure to follow procedure—question not preserved for appellate review

Defendant failed to preserve for appellate review the trial court's alleged error in refusing to excuse a juror for cause, since defendant failed to renew his challenge for cause after exhausting his peremptory challenges and thus failed to comply with the procedure outlined in N.C.G.S. § 15A-1214(h).

Am Jur 2d, Jury § 231.

7. Evidence and Witnesses § 543 (NCI4th)— dissemination of obscene magazines—sex toys and movies—relevancy—best evidence rule not violated

A detective's testimony describing various sex toys available for sale in a store and movies available for viewing at the store was relevant in a prosecution for disseminating obscene magazines to show defendant's knowledge of the character and content of the magazines. Furthermore, this testimony did not violate the best evidence rule because the content of the available movies was not at issue in the case.

Am Jur 2d, Lewdness, Indecency and Obscenity §§ 34-40.

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

8. Criminal Law § 1490 (NCI4th)— condition of probation— propriety

In a prosecution of defendant for dissemination of obscene material, it was not unconstitutional for the trial court to impose as a condition of his probation that he refrain from working in any retail establishment which sold sexually explicit material, since it was clearly related to and grew out of the offense charged. N.C.G.S. § 15A-1343(b1)(10).

Am Jur 2d, Criminal Law §§ 570-576.

Propriety, as condition of probation granted pursuant to 18 USCS sec. 3651 or similar predecessor statute, of requiring defendant to give up profession or occupation. 35 ALR Fed. 631.

Appeal by defendant from judgment entered 2 June 1995 by Judge Knox V. Jenkins in Lee County Superior Court. Heard in the Court of Appeals 16 May 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson G. Kelley and Associate Attorney General Melanie L. Vitpil, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for defendant-appellant.

LEWIS, Judge.

Defendant was charged with disseminating obscenity in violation of N.C. Gen. Stat. section 14-190.1. On 2 June 1995, he was convicted by jury verdict and sentenced to two years imprisonment. The trial court suspended this sentence and placed him under supervised probation for two years upon the conditions that he complete 100 hours of community service and not work anywhere that sells sexually explicit material. Defendant appeals.

At trial, the State called Detective Sergeant Kevin Gray of the Sanford Police Department. Detective Gray testified that he was on duty on 23 September 1993 when he entered an adult establishment called the Sanford Video and News in order to purchase "sexually explicit materials." He described the store as containing hundreds of sexually explicit magazines and videos and various "sex toys." After entering the store, Detective Gray saw defendant behind the counter by the register. After about twenty minutes, the detective selected

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

two magazines and bought them from defendant. Detective Gray testified that the magazines were wrapped individually in clear cellophane, providing a full view of the front and back of the magazines, but preventing the pages within from being seen.

The magazines were admitted into evidence. On the front cover of State's Exhibit No. 3 is a profile view of two naked women touching each other. The front of State's Exhibit No. 2 displays frontal nudity of a female engaged in various simultaneous sexual acts with two protuberant males. On the reverse cover is a female engaged in fellatio.

The defense did not present any witnesses.

Defendant fails to argue assignments of error one and five in his brief. Therefore, they are deemed abandoned. N.C.R. App. P. 28(b)(5) (1996).

[1] Defendant first argues that the trial court erred in refusing to instruct the jury that there must be unanimous agreement that at least one of the two magazines purchased by Detective Gray was obscene. Defendant contends this refusal violates his right to a unanimous jury verdict because the instructions given permitted a conviction when "some but not all jurors thought one magazine was obscene while other jurors, but not all, thought the other magazine was obscene."

To support his argument, defendant cites *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991) and *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). In those cases, our Supreme Court held that disjunctive instructions which allow the jury to find that the defendant had committed either of two separate crimes are fatally defective because ambiguous and uncertain jury verdicts result. *Lyons*, 330 N.C. at 306-07, 412 S.E.2d at 314; *Diaz*, 317 N.C. at 554, 346 S.E.2d at 494. We do not find these cases controlling. Instead, we conclude that the present case is governed by another line of cases beginning with *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

In *Hartness*, the defendant was charged with taking indecent liberties with a child. 326 N.C. at 562, 391 S.E.2d at 178. In instructing the jury, the trial court defined an indecent liberty as "an immoral, improper or indecent touching or act by the defendant upon the child, or an inducement by the defendant of an immoral or indecent touching by the child." *Id.* at 563, 391 S.E.2d at 178. The defendant argued that the instruction allowed for a potentially nonunanimous jury verdict. *Id.* The Supreme Court, however, found no error in the instruction. *Id.* at 567, 391 S.E.2d at 181. Instead, it determined that even if

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

some jurors found that the defendant committed one type of proscribed sexual conduct and others found that he committed another, “the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of ‘any immoral, improper, or indecent liberties,’ ” which is what the statute prohibits. *Id.* at 565, 391 S.E.2d at 179.

Subsequently, our Supreme Court revisited this issue in *Lyons* and explained the differences in the two lines of cases:

There is a critical difference between the lines of cases represented by *Diaz* and *Hartness*. The former line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The latter line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

Lyons, 330 N.C. at 302-03, 411 S.E.2d at 312. While later analyzing the same issue, this Court concluded, “[T]he difference is whether the two underlying acts are separate offenses or whether they are merely alternative ways to establish a single offense.” *State v. Almond*, 112 N.C. App. 137, 144, 435 S.E.2d 91, 96 (1993).

We hold that the present situation involves alternative methods of establishing a single offense and is therefore controlled by *Hartness*. G.S. 14-190.1 does not contain separately punishable elements. It prohibits one single offense: “intentionally disseminat[ing] obscenity,” G.S. § 14-190.1(a) (1993), which may be proved by evidence of any one of several acts.

The fact that the present sale involves two magazines does not transform defendant’s crime into a multi-offense situation like in *Diaz* or *Lyons*. Under G.S. 14-190.1, despite the number of obscene materials sold at one time, a defendant may not be convicted of more than one offense for each transaction. *State v. Smith*, 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988). We hold that the instructions provided did not violate defendant’s right to a unanimous verdict.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss at the close of the State’s evidence. He argues that there was insufficient evidence to convict him.

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

The United States Supreme Court has established a three part test to determine if material is obscene:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 37 L. Ed. 2d 419, 431 (1973) (citations omitted). Subsequent cases have clarified this standard, stating that the first two parts should be decided by a jury applying community standards, while the third is to be decided according to a reasonable person standard. *Pope v. Illinois*, 481 U.S. 497, 500, 95 L. Ed. 2d 439, 445 (1987); *State v. Watson*, 88 N.C. App. 624, 627, 364 S.E.2d 683, *disc. review denied*, 322 N.C. 485, 370 S.E.2d 235 (1988). G.S. 14-190.1 basically codifies this test. It also requires proof of intent and guilty knowledge on the part of the defendant. *State v. Mayes*, 86 N.C. App. 569, 580, 359 S.E.2d 30, 37 (1987), *aff’d*, 323 N.C. 159, 371 S.E.2d 476 (1988), *cert. denied*, 488 U.S. 1009, 102 L. Ed. 2d 784 (1989).

Defendant specifically argues that the State did not present evidence of Lee County community standards as they existed in 1993, the date of the alleged offense. He contends that any other reading of “contemporary” would violate the constitutional proscription against ex post facto laws. We find no merit in this argument and defendant provides no caselaw to support it.

Whether materials on the whole appeal to the prurient interest and are patently offensive are “issues of fact for the jury to determine applying contemporary community standards.” *Pope*, 481 U.S. at 500, 95 L. Ed. 2d at 445 (citing *Smith v. United States*, 431 U.S. 291, 52 L. Ed. 2d. 324 (1977)). “A juror is entitled to draw on *his own knowledge* of the views of the average person in the community . . . for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a ‘reasonable’ person in other areas of the law.” *Hamling v. United States*, 418 U.S. 87, 104-05, 41 L. Ed. 2d 590, 613 (1974) (emphasis added). Since no evidence of what is “reasonable” is presented to juries, we hold that evidence of what constitutes “contemporary community standards” is unnecessary. It was evident to the jury that the incident in question happened in 1993

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

and they were properly instructed to apply “contemporary community standards.” This assignment of error is overruled.

[3] Additionally, defendant argues that there was insufficient evidence presented that he knew the magazines were obscene. Defendant correctly acknowledges that the State must prove that he had “knowledge of both the content and character of the materials disseminated.” See *Watson*, 88 N.C. App. at 631, 364 S.E.2d at 687. However, we believe that the State has met this burden.

In *Watson*, this Court made the following relevant statements:

The State presented evidence that the items purchased . . . were selected from a room in the bookstore containing sexually oriented devices, as well as sexually explicit materials with illustrated covers, grouped and displayed on bookshelves which were labeled according to the viewer’s sexual interest—gay sex, lesbian sex, sadism, etc. Defendant was not merely a sales clerk but the store manager, from which it could be reasonably inferred that she had knowledge of and authority over the store’s inventory and its arrangement. Moreover, the magazine cover and the box containing the film were captioned and graphically illustrated with photographs of males and females engaged in oral, vaginal, and group sex. This, in our opinion, may reasonably be considered some indication of the materials’ contents.

We hold that the foregoing, when viewed in the light most favorable to the State, constitutes sufficient circumstantial evidence to allow a reasonable inference that defendant knew the character and content of the materials she disseminated.

Id.

After reviewing the record, it is evident that the circumstances in *Watson* are almost identical to the case at hand. The only substantial difference is that defendant was not also the manager of the store. However, it is clear that this circumstance was not determinative in *Watson*, but merely one factor which the court considered. Therefore, we hold that even without it, there was sufficient circumstantial evidence that defendant knew the character and the content of the materials he disseminated.

[4] Defendant next assigns error to several of the trial court’s instructions to the jury. First, he contends that the trial court’s defin-

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

ition of "prurient" was error. The court instructed: "A prurient interest in sex is an unhealthy, abnormal, lascivious, shameful or morbid sexual interest." Defendant argues that in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 86 L. Ed. 2d 394 (1985), the United States Supreme Court prohibited states from defining "prurient interest" in terms of arousing lust. According to defendant, since "lascivious" means "lustful," the instruction is error. We find defendant's reading of *Brockett* flawed.

The Washington statute at issue in *Brockett* defined "prurient" as " 'that which incites lasciviousness or lust.' " *Brockett*, 472 U.S. at 494, 86 L. Ed. 2d at 399. The Supreme Court invalidated the statute only in so far as "lust" was taken to include a normal interest in sex. *Id.* at 504-05, 86 L. Ed. 2d at 406. However, the Court did recognize that "prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex." *Id.* at 504, 86 L. Ed. 2d at 406 (citing *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498 (1957)).

Therefore, contrary to defendant's argument, the Supreme Court did not proscribe the use of "lust" in obscenity definitions. Rather, it disallowed any definition which could be read to include a normal, healthy sexual interest. Clearly, the above instruction which also includes the terms "unhealthy," "abnormal," "shameful" and "morbid" could not be understood by any jury to include a normal interest in sex. Defendant's assignment of error is overruled.

Second, defendant argues that the trial court provided the jury with the incorrect standard for determining whether the materials lack serious value. However, during closing arguments, defendant's attorney admitted to the jury that the magazines in question lacked serious literary, artistic, political or scientific value and conceded that issue. On appeal, defendant cannot argue a matter he conceded at trial.

Third, defendant contends that it was error for the trial court to instruct the jury to apply the "current standards here in your community." Even if this instruction was error, we find it harmless. The alleged sale took place on 23 September 1993. The trial occurred 30 May through 2 June 1995. Community standards could not have changed so drastically during that period of time that the jury would have reached a different verdict had it been instructed to apply standards at the time of the incident.

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

Defendant also assigns error to two portions of the trial court's charge to which he did not object at trial and alleges plain error. "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. King*, 342 N.C. 357, 365, 464 S.E.2d 288, 293 (1995). After reviewing the record, we conclude that even if the trial court's instructions were error, neither rises to the level of plain error. This assignment of error is overruled.

Finally, defendant assigns error to the trial court's instruction that the jury could infer that the defendant had knowledge of the nature and content of the magazines based on circumstantial evidence. He argues that the State was not entitled to such an instruction because it has the burden to prove defendant's knowledge. In making his argument, defendant ignores longstanding precedent ruling that circumstantial evidence is sufficient to prove a defendant's knowledge in cases involving the dissemination of obscenity. *E.g.*, *Watson*, 88 N.C. App. at 632, 364 S.E.2d at 687; *State v. Horn*, 18 N.C. App. 377, 381, 197 S.E.2d 274, 277 (1973), *aff'd*, 285 N.C. 82, 203 S.E.2d 36, *cert. denied*, *Bryant v. North Carolina*, 419 U.S. 974, 42 L. Ed. 2d 188 (1974).

Defendant also cites *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983), in support of his proposition that the instruction on circumstantial evidence was improper. He apparently argues that since the State presented direct evidence of defendant's knowledge, an instruction on circumstantial was improper.

In *Bates*, the defendant wanted a "jury instruction as to the effect of circumstantial evidence when no direct evidence is presented." *Id.* at 537, 308 S.E.2d at 264. The Court held that since there was direct evidence presented, defendant's requested instruction was not appropriate. *Id.* Despite the clarity of that Court's holding, defendant misinterprets it and provides the following statement, citing *Bates*: "Where the evidence elicited at trial includes direct evidence bearing on any issue for the jury's determination, a circumstantial evidence instruction is erroneous." This is clearly not the holding of *Bates*. Accordingly, we find no merit in defendant's argument.

Defendant next assigns error to the trial court's refusal to give his written request for jury instructions as asked. However, the trial court is not required to give an instruction exactly as requested. *State v.*

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

Monk, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). It is sufficient that the court substantially gives the instruction if the request is legally correct and supported by the evidence. *See id.*

In this case, we hold that the trial court gave, in substance, those requested instructions which are correct in law. This assignment of error is overruled.

[5] The defendant next argues that the trial court erred in overruling his objections to portions of the State's closing argument. At trial, defendant objected to the following statements made by the prosecutor:

If any activity is illegal, it doesn't make a difference that there are two adults participating in the activity. It's still illegal. Think about it. Does it really make a difference whether a person sells cocaine to an adult or a child?

Again, the Court will tell you it is an unhealthy, abnormal, lascivious, shameful or morbid interest. What does that mean? Well, I submit to you perhaps you can think of it this way: Does this material pass the mama test? By that I mean, how would you feel if your mama saw you looking at this?

The defense might argue, 'My poor client's just a clerk. Why don't they go after the real bad guys, the managers and the owners?' Well, folks, he made the conscious decision to work there knowing exactly what he was doing, and that's why he's arguing you shouldn't go after the street level drug dealers. You ought to only go after the big guys.

Defendant argues that the statements made by the prosecutor alter the definition of "prurient" and compared him to a drug dealer. He contends that such prejudicial remarks entitle him to a new trial.

"The scope of the arguments to the jury is in the sound discretion of the trial judge and his ruling will not be disturbed except upon a finding of prejudicial error." *State v. Spears*, 70 N.C. App. 747, 751, 321 S.E.2d 13, 15 (1984), *aff'd*, 314 N.C. 319, 333 S.E.2d 242 (1985). In determining whether prejudicial error occurred, the prosecutor's argument must be viewed as a whole. *State v. Roland*, 88 N.C. App. 19, 28, 362 S.E.2d 800, 806 (1987), *aff'd*, 322 N.C. 469, 368 S.E.2d 385 (1988).

After reviewing the State's closing argument as a whole, we find no error prejudicial to defendant. It is clear that the prosecutor did

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

not equate defendant with drug dealing, nor did he expand the definition of "prurient." Rather, he provided proper statements of the law, but used analogies, which the jurors were free to reject or ignore, to illustrate his message. This assignment of error is overruled.

[6] Defendant also assigns error to the trial court's refusing to excuse a juror for cause. N.C. Gen. Stat. section 15A-1214(h) provides:

In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

- (1) Exhausted the peremptory challenges available to him;
- (2) Renewed his challenge as provided in subsection (i) of this section; and
- (3) Had his renewal motion denied as to the juror in question.

G.S. § 15A-1214(h) (1988).

After reviewing the record, it is evident that defendant exhausted his peremptory challenges, but failed to renew his challenge for cause. By failing to comply with the procedure outlined in G.S. 15A-1214(h), defendant failed to preserve the alleged error for appellate review. *See State v. Sanders*, 317 N.C. 602, 607, 346 S.E.2d 451, 455 (1986). While it is true that defendant asked for additional peremptory challenges, that action is insufficient to preserve the issue since the statute makes renewal of the challenge mandatory. *See id.* at 608, 346 S.E.2d at 456. This assignment of error is overruled.

[7] Defendant also argues that the trial court erred in allowing Detective Gray to describe the various sex toys available for sale and movies available for viewing at the Sanford Video and News store. Defendant argues that the testimony is irrelevant. The trial court allowed the testimony because it went to the issue of defendant's knowledge; the judge offered to give a special instruction to the jury but defendant declined.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401 (1992). The evidence at issue is clearly relevant to the instant proceeding since the prosecution must prove

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

defendant's knowledge of the character and content of the magazines. See *Watson*, 88 N.C. App. at 631, 364 S.E.2d at 687. This knowledge is often proved solely by circumstantial evidence. *E.g. Horn*, 18 N.C. App. at 381, 197 S.E.2d at 277. Therefore, this testimony was relevant to the issue of defendant's knowledge, and because defendant failed to request a limiting instruction, its admission cannot be held error. See *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988) (stating that "admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions.")

Defendant argues that even if the content of the movies available for viewing at the Sanford Video and News was relevant, Detective Gray's testimony should have been excluded based on the best evidence rule. We disagree. The best evidence rule provides: "To prove the content of a . . . recording . . . , the original . . . is required" N.C.R. Evid. 1002 (1992). "The rule does not apply . . . when [the] contents are not in question or when they are only "collateral" to the issues in the case.'" *State v. Mills*, 39 N.C. App. 47, 49-50, 249 S.E.2d 446, 448 (1978), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 33 (1979).

Clearly, the content of the movies available at the store is not at issue in this case. Rather, it is a collateral matter tending to show defendant's knowledge circumstantially. The main issue in this case is the content of the magazines sold by defendant, which were admitted into evidence. Additionally, even if the trial court erred in allowing Detective Gray to testify in a single sentence as to the general content of the movies, we conclude that it would not be harmful error. There was a great deal of other evidence to prove defendant's knowledge. Therefore, this assignment of error based on the best evidence rule has no merit.

Defendant next contends, and the State agrees, that the trial court erred in sentencing him for a Class I felony rather than a Class J felony. Therefore, we remand this matter for resentencing.

[8] Defendant further contends that it was unconstitutional for the trial court to impose as a condition upon his probation that he refrain from working in any "retail establishment that sells sexually explicit material." Under N.C. Gen. Stat. section 15A-1343(b1), the trial court may impose any conditions on probation that it determines "to be reasonably related to [defendant's] rehabilitation." G.S.

STATE v. JOHNSTON

[123 N.C. App. 292 (1996)]

§ 15A-1343(b1)(10) (1995). The trial court is accorded “substantial discretion” in imposing conditions under this section. *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985).

We are persuaded by the reasoning in *State v. Simpson*, 25 N.C. App. 176, 212 S.E.2d 566, *cert. denied*, 287 N.C. 263, 214 S.E.2d 436 (1975), that the condition imposed on defendant is not unconstitutional. In upholding a condition which limited defendant’s employment in the construction field that Court stated:

It is obvious from the condition upon which defendant’s prison sentence was suspended and the nature of the crime involved that the trial judge considered as an important aspect of the defendant’s rehabilitation that the defendant not find himself in a position wherein he would more than likely repeat this same offense. . . . This condition was clearly directly related to and grew out of the offense for which the defendant was convicted and was consistent with proper punishment for the crime.

Simpson, 25 N.C. App. at 180, 212 S.E.2d at 569 (citations omitted). Likewise, since the condition imposed upon defendant was clearly related to and grew out of the offense of disseminating obscenity, we rule that it is not unconstitutional. This argument has no merit.

Finally, defendant argues that G.S. 14-490.1 is unconstitutional. This statute has previously been held constitutional, *see State v. Anderson*, 322 N.C. 22, 40, 366 S.E.2d 459, 470, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988); *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 554, 351 S.E.2d 305, 312 (1986), *aff’d*, 320 N.C. 485, 358 S.E.2d 383 (1987), and defendant’s argument must therefore fail.

No error in trial; remanded for resentencing.

Judges JOHNSON and MARTIN, MARK D. concur.

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

**DR. KENNETH P. CARLSON AND MARY JEAN CARLSON, PLAINTIFFS, v. BRANCH
BANKING AND TRUST COMPANY, DEFENDANT**

No. COA95-605

(Filed 6 August 1996)

**1. Banks and Other Financial Institutions § 59 (NCI4th)—no
duty of defendant to monitor use of loan proceeds—no neg-
ligence by defendant**

Defendant bank was entitled to a directed verdict in its favor as to plaintiffs' claim for negligence where plaintiffs entered into an agreement with a third person, based on their own investigation and relationship with him, to provide a letter of credit; plaintiffs entered into the arrangement with the third person before defendant was approached in regard to financing the acquisition of a mutual fund company; after a perfunctory investigation, defendant subsequently agreed to provide financing primarily due to plaintiffs' letter of credit from another bank; the understanding between the other bank's loan officer and defendant's loan officer was that the letter of credit was security for funds to be used for the mutual fund acquisition; defendant's personnel disbursed loan proceeds to the third person without a system to monitor his use of the funds; any duty on the part of a commercial lender to a guarantor to monitor the use of loan proceeds by a borrower must arise through contract; and in the absence of any express provision in plaintiffs' letter of credit requiring that defendant monitor the use of the loan proceeds to insure their use for the intended purpose of the loan, defendant owed plaintiffs no legal duty to do so.

Am Jur 2d, Banks §§ 683 et seq.

**Bank's "reasonable commercial standards" defense
under UCC sec. 3-419(3). 49 ALR4th 888.**

**2. Fraud, Deceit, and Misrepresentation § 38 (NCI4th);
Unfair Competition or Trade Practices § 39 (NCI4th)—
fraud—unfair and deceptive trade practices—directed ver-
dict for defendant proper**

The trial court did not err in directing verdicts in favor of defendant bank on plaintiffs' claims for fraud and unfair and deceptive trade practices, since there was no evidence that defendant made any representations to plaintiffs with respect to the transaction in question; defendant made no representations

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

to anyone with respect to the intended purpose of the loan; and there was no evidence to sustain a finding that defendant engaged in conduct which was immoral, unethical, or oppressive, or that it participated with a third person in his deception of plaintiffs.

Am Jur 2d, Fraud and Deceit §§ 481 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Appeal by defendant from orders and judgment entered 27 September 1994; and from order entered 14 December 1994 by Judge Lester P. Martin, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 27 February 1996.

Allman Spry Leggett & Crumpler, P.A., by David C. Smith and Linda L. Helms, for plaintiff-appellees.

Moore & Van Allen, PLLC, by Daniel G. Clodfelter and Mary Elizabeth Erwin, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiffs brought this action against defendant Branch Banking and Trust Company ("BB&T") alleging seven separate claims for relief, including, *inter alia*, claims for breach of contract, negligence, breach of warranty, fraud and deceit, and unfair and deceptive practices in violation of G.S. § 75-1.1. The claims arise in connection with a loan, secured by a letter of credit provided by plaintiffs, made by BB&T to Carolina First Holding Corporation ("Carolina First"). In its answer, defendant BB&T denied the material allegations of the complaint and moved to dismiss each of the plaintiffs' claims.

At a jury trial, the evidence tended to show the following: plaintiff Kenneth Carlson, a retired physician, and his wife, plaintiff Mary Jean Carlson, were approached by David Schamens, a local stockbroker whom plaintiffs had known since Schamens was a young child and with whom they had previously done business, regarding a potential investment opportunity. Schamens was also the sole owner and founder of Carolina First. Schamens represented to plaintiffs that in order to establish Carolina First as a full service financial company, the company had entered into a contract to purchase 80.1 percent of the Ivy Management Company, a mutual fund company in Boston that managed the Ivy Fund. The purchase price of approximately \$6.2 million was to be financed in part by bank loans secured by letters of credit. Schamens wanted plaintiffs to provide a \$500,000 letter of

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

credit to help fund the transaction, in return for which plaintiffs would receive 1.8 percent, or 5,000 shares, of the common stock. After the purchase was completed, the bank loans were to be paid back by fees generated by Carolina First, and Carolina First also had an option to buy back plaintiffs' stock, giving plaintiffs approximately a 10 percent return on their investment without the letter of credit ever being drawn upon.

After the initial meeting, plaintiffs considered the proposal and investigated the mutual funds managed by Ivy. Dr. Carlson testified that he kept up with mutual funds "pretty well" by subscribing to investment publications that deal with them, and considered the Ivy Fund to be "an excellent fund." Plaintiffs ultimately decided to invest in the transaction, however, not because they felt they would get a great return on their investment, but because they were primarily interested in helping Schamens with his business. Dr. Carlson described Schamens as being "like a second son."

On or about 10 April 1990, plaintiffs executed a letter of intent with Schamens and entered a more definitive agreement on 1 May 1990 to provide the letter of credit. Plaintiffs understood that the loan was to be used solely for the acquisition of Ivy Management Company, and they had no concern that the funds would be used for anything but the Ivy acquisition. Plaintiffs would not have provided the letter of credit if they thought the funds would be used for some other purpose.

Schamens approached several banks about providing the necessary financing. The 10 April letter of intent indicated that Wachovia Bank, First Union Bank and Southern National Bank ("Southern National") had "preliminarily agreed" to provide loans to finance the Ivy acquisition. Apparently, however, all three banks subsequently decided not to make the loans, though Southern National expressed an interest in serving as the issuer of a letter of credit for the acquisition loan.

In June or early July, Schamens met with Phil Marion and Jim Lewis, commercial lenders at defendant BB&T, and requested defendant to provide a loan for the acquisition. Marion and Lewis felt the loan had a great deal of potential for defendant because Schamens would transfer \$100,000 in Master Note investment to defendant upon closing, and the transaction could lead to defendant acquiring deposit accounts from both Carolina First and Ivy. Lewis made, at best, a perfunctory investigation of the transaction documents provided by

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

Schamens, and on 25 July 1990, Lewis recommended to Ernie J. Sewell, defendant's City Executive in Winston-Salem, that defendant make a loan of \$425,000 for the Ivy acquisition. Lewis' recommendation noted that Carolina First had experienced quarterly losses in its first six months of operation, and that Schamens' liabilities exceeded his outside total net worth, but also advocated that a \$500,000 standby letter of credit from Southern National Bank made the loan worth the documentation risk. A \$425,000 loan to fund the Ivy acquisition was approved on 27 July 1990.

During this time, plaintiffs were notified that the Ivy transaction was ready to proceed, and that Schamens had made an arrangement with Southern National regarding the letter of credit. Plaintiffs dealt with Albert Newsome, a vice-president at Southern National in the commercial banking group, who explained to them that Southern National would supply the letter of credit, and that defendant was providing the loan and would be the beneficiary of the letter of credit. For the bank to offer the letter of credit, however, Newsome first asked plaintiffs to establish a banking relationship with Southern National. Plaintiffs and Newsome also discussed that the letter of credit was to be used to secure funds for the acquisition of the Ivy Management Company, and Newsome discussed this with Lewis.

On 26 July 1990, Southern National executed the \$500,000 letter of credit on behalf of the Carlsons in favor of defendant to provide Carolina First with financing for the Ivy acquisition. The letter of credit was amended on 1 August 1990 to reflect a delay in the date of the loan. The letter of credit, as amended, provided in pertinent part:

SOUTHERN NATIONAL BANK OF NORTH CAROLINA
Southern International Corp.
P.O. Box 34069, Charlotte, NC 28234, U.S.A.
South College St., 2nd Floor, Charlotte, NC 28202, U.S.A.
Telephone: (704)338-5710 Fax: (704)338-5729

IRREVOCABLE STANDBY DOCUMENTARY CREDIT
Dated: July 26, 1990

Advising Bank

Beneficiary
Branch Banking & Trust Company
Post Office Box 2817
Winston-Salem, North Carolina 27102

Credit Number of issuing bank:
S-34-71584A

Applicant
Dr. and Mrs. Kenneth P. Carlson
3108 Buena Vista Road
Winston-Salem, NC 27106

Amount
FIVE HUNDRED THOUSAND AND NO/100
U.S. DOLLARS
U.S.\$500,000.00

Expires
Date: July 16, 1991
in Charlotte, North Carolina

(Credit available by payment at our counters.)

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

WE HEREBY OPEN OUR IRREVOCABLE STANDBY DOCUMENTARY CREDIT IN YOUR FAVOR AVAILABLE BY YOUR DRAFT(S) ON US AT SIGHT FOR 100 PERCENT OF DRAWING BEARING THE CLAUSE "DRAWN UNDER SOUTHERN NATIONAL BANK OF NORTH CAROLINA CREDIT NO. S-34-71584A DATED JULY 26, 1990" ACCOMPANIED BY THE FOLLOWING DOCUMENTS:

A letter purportedly signed by an authorized officer of Branch Banking & Trust Company, Winston-Salem, North Carolina, stating that payment is due under promissory note dated August 2, 1990 in the amount of four hundred twenty-five thousand and no/100 (\$425,000.00) U.S. Dollars by and between Carolina First Holding Corporation and Branch Banking and Trust Company.

Special Conditions:

- A) Partial drawings are prohibited.
- B) The original of this credit must accompany your drawing presented to us hereunder.

Except so far as otherwise expressly stated, this documentary credit is subject to the "Uniform Customs and Practice for Documentary Credits" (1983 Revision) International Chamber of Commerce (Publication No. 400).

At the closing on 2 August 1990, after receiving the letter of credit, defendant issued a commitment letter to Carolina First for the \$425,000 loan "to fund the costs and expenses related to the acquisition of Ivy Management, Inc.," and Carolina First executed its promissory note to the bank. In addition, Schamens executed a personal guarantee, and his wife, Laura, executed a limited guarantee, of the loan.

Lewis personally disbursed the loan proceeds to a newly opened Carolina First checking account at defendant BB&T as follows: \$275,000 on 2 August 1990, done immediately after the closing while Schamens and his wife were still in Lewis' office, from which Lewis wrote a cashier's check for \$25,000 to Mrs. Schamens in a transaction designated as a loan; \$1,162.50 on 3 August 1990 for the origination fee and legal expenses; \$125,000 on 6 August 1990; and \$20,000 on 9 August 1990. From the Carolina First account, Lewis or another BB&T employee, at Schamens' request, authorized the transfer of loan funds to other BB&T accounts as follows: on 2 August 1990, \$151,282.20 was transferred to an account for Carolina First Securities Group, a subsidiary of Carolina First, and \$11,000 was transferred to Schamens' personal investment account; on 3 August, \$17,666.49 was transferred to Old South Investment, another company owned by Schamens; on 6 August, another \$40,000 was transferred to Schamens' personal investment account, \$20,671.23 was transferred to Old South Investment, \$23,000 was transferred to an account of Carolina First Asset Management Company, \$8,000 was transferred to Carolina First Income Fund, and another \$100 was transferred to the Carolina First Asset Management Company account; on 9 August, \$20,000 was transferred to an account of

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

Carolina First Securities; and on 20 August, \$500 was transferred to the Carolina First Income Fund account. Checks, debit and credit memos, and histories from these various accounts show that the majority of the loan funds were not used for the Ivy acquisition, and that most of the credited accounts were not mentioned in the Ivy acquisition documents. Indeed, the funds were used for such things as a car for Schamens, construction on Schamens' home, and expenses and reimbursements for Schamens' brokerage company.

Lewis testified that defendant had no system to ensure that the loan funds were being used solely for the Ivy acquisition, but that he had indicated to Schamens the purpose for which defendant BB&T had agreed to make the loan funds available, had incorporated that purpose into the loan agreement, and had "trusted [his] borrower." Lewis testified that Schamens could then use the funds at will. Lewis also testified that Schamens had explained to him that the check to Schamens' wife was to reimburse her for funds she had advanced for the Ivy acquisition.

Unknown to plaintiff or BB&T, the contract for Carolina First to purchase Ivy Management Company had, in fact, become null and void as of 4 June 1990, almost two months prior to the issuing of the letter of credit. On 24 August 1990, the Secretary of State placed Carolina First and its subsidiaries in receivership. On the same date, defendant made demand on Southern National for payment under plaintiffs' letter of credit. Southern National made payment to defendant, and plaintiffs reimbursed Southern National for the amounts paid under the letter of credit.

At the close of plaintiffs' evidence, the trial court granted defendant's motion for a directed verdict as to all plaintiffs' claims except the claims for breach of contract, breach of warranty and negligence. Defendant renewed its motion as to these claims at the close of all the evidence. The trial court deemed plaintiffs' claim for breach of warranty to be the same as their claim for breach of contract, and denied the motion as to the claims for breach of contract and negligence.

The jury returned a verdict finding that a contract existed between plaintiffs and defendant BB&T whereby the loan funds were only to be used for costs and expenses related to the Ivy acquisition, that defendant BB&T had not breached the contract, but that plaintiffs had been damaged by negligence on the part of defendant BB&T, and their damages were \$245,000. The trial court entered judgment on

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

the verdict, and denied defendant's subsequent motions for judgment notwithstanding the verdict, or, in the alternative, for a partial new trial. Defendant appeals, and plaintiffs cross-assign error to the trial court's directing verdicts in favor of defendant BB&T as to their claims for fraud and unfair and deceptive practices.

I.

[1] The jury found that plaintiffs and defendant BB&T had contracted that the loan funds were to be used only for costs and expenses related to the Ivy acquisition, and that defendant had not breached the contract. However, the jury found that defendant was negligent. Defendant BB&T contends it could not have been negligent because it owed no duty to plaintiffs in connection with the transaction. Thus, defendant contends, the trial court should have granted its motion for directed verdict, or its subsequent motion for judgment notwithstanding the verdict, as to the negligence claim.

A motion for a directed verdict tests the sufficiency of the evidence to submit the case to the jury and to support a verdict in favor of the nonmoving party. *Goodwin v. Investors Life Insurance*, 332 N.C. 326, 419 S.E.2d 766 (1992). A motion for judgment notwithstanding the verdict is essentially a renewal of a motion for a directed verdict, and the test to be applied in determining the sufficiency of the evidence is the same for either motion: the nonmovant's evidence must be taken as true and must be considered in the light most favorable to the nonmovant. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985); *Tate v. Christy*, 114 N.C. App. 45, 440 S.E.2d 858 (1994).

Negligence is a failure to exercise proper care in the performance of some legal duty owed by a defendant to a plaintiff under the circumstances. *Mattingly v. R.R.*, 253 N.C. 746, 117 S.E.2d 844 (1961). Thus, for plaintiffs to recover on a theory of negligence, they must first show the existence of a legal duty owed to them by defendant. "A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty." *Toone v. Adams*, 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964).

Plaintiffs contend defendant BB&T owed them a legal duty to monitor the loan proceeds to see that they were used for the Ivy acquisition because defendant, in relying on plaintiffs' letter of credit, understood such use was the only intended purpose for which plaintiffs provided the letter of credit. Plaintiffs contend that such a duty

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

is "well-grounded" in the common law, and presented expert opinion testimony to the effect that generally accepted banking standards and defendant's own internal procedures required that defendant monitor the loan proceeds and that defendant had failed to do so.

"When there is no dispute as to the facts . . . the issue of whether a duty exists is a question of law for the court." *Mozingo v. Pitt County Memorial Hospital*, 101 N.C. App. 578, 400 S.E.2d 747 (1991), *affirmed*, 331 N.C. 182, 415 S.E.2d 341 (1992). *See also* Restatement (Second) of Torts § 328(b) (1965) (in negligence action, court must determine whether the facts "give rise to any legal duty"). Thus, the dispositive issue is whether defendant had a legal duty to monitor the disbursement of the loan proceeds for plaintiffs' benefit to see that Schamens used the funds only for the Ivy acquisition. We hold that no such duty arose upon the facts of this case.

Considered in the light most favorable to plaintiffs, the evidence shows plaintiffs entered into an agreement with Schamens, based on their own investigation and relationship with him, to provide the letter of credit. Plaintiffs entered into the arrangement with Schamens before defendant was approached in regard to financing the Ivy acquisition. After a perfunctory investigation, defendant subsequently agreed to provide financing primarily due to plaintiffs' letter of credit from Southern National. The understanding between plaintiffs and Southern National's Albert Newsome, and between Newsome and defendant BB&T's loan officer, Jim Lewis, was that the letter of credit was security for funds to be used for the Ivy acquisition. Lewis, or other BB&T personnel familiar with the transaction, disbursed loan proceeds to Schamens without a system to monitor his use of the funds, and, indeed, when there were indications that he may have been using the funds for purposes unrelated to the Ivy transaction.

Generally, in disbursing a loan:

[a] bank must make such application of the proceeds . . . as is agreed upon in the contract between it and the borrower, and is liable for a failure to do so. Ordinarily, under the contract of loan, the bank is to turn the proceeds over to the borrower or his order; and, if such application is made, the bank has fulfilled its part of the contract, and it is not liable for further disposition of the fund.

9 C.J.S. *Banks and Banking* § 395 (1938 & Supp. 1995). In this case, defendant applied the proceeds as had been agreed between it and its borrower, Carolina First. Though the statement of purpose in the loan

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

agreement between defendant and Carolina First indicated that the loan was “to fund the cost and expenses related to the acquisition of Ivy Management, Inc.,” this Court has previously held that such purpose statements are permissive and merely describe what the borrower may do with the money rather than giving rise to a lender’s affirmative duty to a third party. *Cartwood Construction v. Wachovia Bank & Trust Co.*, 84 N.C. App. 245, 352 S.E.2d 241, *affirmed*, 320 N.C. 164, 357 S.E.2d 373 (1987).

Plaintiffs have cited no cases from North Carolina recognizing the existence of the duty they claim in this case. However, in arguing that such a duty is “well-grounded” in the common law, plaintiffs direct us to cases in similar contexts from other jurisdictions. *See Fikes v. First Federal Sav. and Loan Ass’n.*, 533 P.2d 251 (Alaska 1975); *Burkons v. Ticor Title Ins. Co.*, 813 P.2d 710 (Ariz. 1991); *Dickens v. First American Title Ins. Co.*, 784 P.2d 717 (Ariz. App. 1989); *Glencoe State Bank v. Cole*, 265 Ill. App. 158 (1932); *Peoples Bank & Trust Co. v. L & T Developers, Inc.*, 434 So. 2d 699 (Miss. 1983); *Home Federal Sav. and Loan Ass’n. v. Depass*, 340 S.E.2d 545 (S.C. 1986). We first note that each of the cases cited by plaintiffs involve construction lending rather than commercial lending which, while certainly not dispositive, may more easily permit monitoring through on-site inspections. *See Peoples Bank & Trust Co. v. L & T Developers, Inc.*, 434 So.2d 699 (Miss. 1983). Moreover, the existence of an implied duty on the part of a lender to a guarantor to monitor the borrower’s use of loan proceeds is far from universally recognized. *See, e.g., Light v. Equitable Mortgage Resources, Inc.*, 383 S.E.2d 142 (Ga. App. 1989) (holding that where lender undertook no duties for the benefit of guarantors, lender owed guarantors no duty with regard to disbursement of construction loan proceeds to developer). Indeed, *Glencoe State Bank v. Cole*, 265 Ill. App. 158 (1932), cited by plaintiffs in support of their argument, has been disavowed by a federal district court which predicted it to be “extremely unlikely that the Illinois Supreme Court would adopt . . . the implied duty recognized in the *Glencoe* court’s depression-era ruling.” *Home Sav. Ass’n of Kansas City v. State Bank*, 763 F. Supp. 292, 298 (N.D. Ill. 1991). The federal district court stated:

[w]ere the Illinois Supreme Court to adopt the holding of the *Glencoe* court today, it would stand solidly in the minority of jurisdictions that have addressed the issue. As these other courts have held:

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

Where there is an agreement subordinating a subsequent lien for purposes of a construction loan, in the absence of an *express covenant* from the subsequent lienor to the prior lienor to see to the application of the sums advanced, the diversion of funds on the part of the mortgagor is a risk run by the prior lienor unless he is able to demonstrate collusion between the mortgagor and the subsequent lienor.

Id. (quoting *Hyatt v. Maryland Fed. Sav. & Loan Ass'n*, 42 Md.App. 623, 402 A.2d 118, 122 (1979) (emphasis added)) (citing *Big Land Invest. Corp. v. Lomas & Nettleton Financial Corp.*, 657 P.2d 837, 843 (Alaska 1983); *People's Bank & Trust Co. v. Rocky Mountain, Etc.*, 620 P.2d 58 (Colo. App. 1980); *First Connecticut Small Business Invest. Co. v. Arba, Inc.*, 170 Conn. 168, 365 A.2d 100, 104 (1976); *Indiana Mortgage & Realty Investors v. Peacock Constr. Co.*, 348 So. 2d 59 (Fla. App.), *cert. denied*, 353 So. 2d 677 (Fla. 1977); *Provident Fed. Sav. & Loan Ass'n v. Idaho Land Developers, Inc.*, 114 Idaho 453, 757 P.2d 716 (App. 1988); *Rockhill v. United States*, 288 Md. 237, 418 A.2d 197, 204 (1980); *Tuscarora, Inc. v. B.V.A. Credit Corp.*, 218 Va. 849, 241 S.E.2d 778 (1978)).

In our view, any duty on the part of a commercial lender to a guarantor to monitor the use of loan proceeds by a borrower, must arise through contract. *See Sunset Investments, Ltd. v. Sargent*, 52 N.C. App. 284, 278 S.E.2d 558, *disc. review denied*, 303 N.C. 550, 281 S.E.2d 401 (1981) (holding that a party providing a letter of credit "fails at its peril" to include in the letter language restricting honor and payment of the credit). In the absence of any express provision in plaintiffs' letter of credit requiring that defendant BB&T monitor the use made by Carolina First and Schamens of the loan proceeds to assure their use for the intended purpose of the loan, defendant owed plaintiffs no legal duty to do so. In the absence of such a duty, there can be no claim for negligence. Accordingly, defendant was entitled to a directed verdict in its favor as to plaintiffs' claim for negligence, and the judgment entered on the jury's verdict must be reversed.

II.

[2] Plaintiffs cross-assign as error the trial court's granting of directed verdicts in favor of defendant as to their claims for fraud and unfair and deceptive practices. We find no error in these rulings by the trial court.

Our Supreme Court has defined the essential elements of fraud as follows:

CARLSON v. BRANCH BANKING AND TRUST CO.

[123 N.C. App. 306 (1996)]

[P]laintiff must show: (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Odom v. Little Rock & I-85 Corp., 299 N.C. 86, 91-92, 261 S.E.2d 99, 103 (1980). *See Myers & Chapman, Inc., v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989). There is no evidence in the record before us sufficient to sustain a verdict in favor of plaintiffs on their claim of fraud. Defendant made no representations to plaintiffs with respect to the transaction; its dealings concerning the letter of credit were solely with Mr. Newsome of Southern National. Moreover, defendant made no representations to Newsome with respect to the intended purpose of the loan; the understandings of all of the parties were based on Schamens' representations as to the purpose of the loan.

Under G.S. § 75-1.1, a "practice is unfair if it offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, (citation omitted)" and "is considered deceptive if it has the capacity or tendency to deceive." *Wachovia Bank & Trust Co. v. Carrington Development Assoc.*, 119 N.C. App. 480, 487, 459 S.E.2d 17, 21 (1995). There is no evidence in this case to sustain a finding that defendant BB&T engaged in conduct which was immoral, unethical, or oppressive, or that it participated with Schamens in his deception of plaintiffs. Accordingly, plaintiffs' cross-assignments of error are overruled. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452 (1979).

The judgment from which defendant appeals must be reversed and this case remanded for the entry of judgment dismissing plaintiffs' claims.

Reversed and remanded.

Judges JOHNSON and McGEE concur.

ONSLow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

ONSLow COUNTY, PLAINTIFF, v. GUY J. PHILLIPS, AND WIFE, LYND A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS AND WIFE, LYND A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER DEFENDANTS & BETTY M. RUSSELL, ALEX WARLICK, JR., TRUSTEE, NCNB NATIONAL BANK OF NORTH CAROLINA NOW NATIONSBANK, MARSHALL F. DOTSON, JR., TRUSTEE, LIENHOLDERS

ONSLow COUNTY, PLAINTIFF v. GUY J. PHILLIPS AND WIFE, LYND A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS AND WIFE, LYND A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER DEFENDANTS

ONSLow COUNTY, PLAINTIFF v. GUY J. PHILLIPS AND WIFE, LYND A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS AND WIFE, LYND A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER DEFENDANTS & NCNB NATIONAL BANK OF NORTH CAROLINA NOW NATIONSBANK, MARSHALL F. DOTSON, JR., TRUSTEE, LIENHOLDERS

ONSLow COUNTY, PLAINTIFF v. GUY J. PHILLIPS AND WIFE, LYND A. PHILLIPS, AND ANY HEIRS, ASSIGNS OR DEVISEES OF GUY J. PHILLIPS AND WIFE, LYND A. PHILLIPS, OR ANY OTHER PERSON OR ENTITY CLAIMING THEREUNDER DEFENDANTS

No. COA95-390

(Filed 6 August 1996)

**1. Intentional Infliction of Mental Distress § 2 (NCI4th)—
intentional and negligent infliction of emotional distress—
insufficiency of allegations**

The trial court should have granted summary judgment against defendants on their claims for intentional and negligent infliction of emotional distress where defendants did not allege facts showing that the alleged distress was severe, and there was no record evidence of severe emotional distress.

**Am Jur 2d, Fright, Shock, and Mental Disturbance
§§ 4-7, 17.**

**2. Constitutional Law § 107 (NCI4th)— deprivation of due
process—claim adequately stated**

Defendants adequately stated a claim under 42 U.S.C. § 1983 for deprivation of due process of law where they alleged that plaintiff county's action in adding attorney's fees to tax liens was a "practice" and a "scheme, and they also alleged that plaintiff, by this practice, violated their due process rights by arbitrarily adding the attorney's fees to the tax lien without proper notice and hearing or opportunity to avoid the penalty.

Am Jur 2d, Constitutional Law §§ 827 et seq.

ONslow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

3. Constitutional Law § 107 (NCI4th)— claim for violation of due process rights—no summary judgment

Plaintiff was not entitled to summary judgment on defendants' claim for violation of their due process rights where the record evidence raised a genuine and material issue as to whether defendants were given proper notice that plaintiff had assessed \$1,600 in attorney's fees without affording defendants an opportunity to be heard and an issue as to whether plaintiff properly followed the statutory procedure for collection of taxes and attorney's fees.

Am Jur 2d, Constitutional Law §§ 827 et seq.**4. Taxation § 183 (NCI4th)— refusal to release tax lien until attorney's fees paid—assessment of attorney's fees error**

There as no merit to plaintiff county's assertion that it acted properly under N.C.G.S. § 105-362(a), -374(e), and -374(i) when it refused to release the tax lien against defendants' property until the attorney's fees were paid, since those statutes did not specifically include attorney's fees as costs which could be added to a tax lien, and the attorney's fee awarded in a foreclosure action should be determined by the court, not the taxing unit or the contracting attorney.

. Am Jur 2d, State and Local Taxation § 859.**5. Taxation § 219 (NCI4th)— foreclosure for failure to pay taxes—counterclaim not barred**

Defendant landowners were not required to comply with N.C.G.S. § 105-381, requiring payment of a tax, as a prerequisite to filing their counterclaim, since defendants attempted to tender the taxes due as stated in the foreclosure complaint; the attorney's fees claimed by plaintiff county were not listed in the foreclosure complaint as taxes and were not costs allowed by law; defendants did not initiate this suit but instead counterclaimed in response to the foreclosure suit by plaintiff; and the statute should not be applied to preclude a counterclaim in a foreclosure proceeding.

Am Jur 2d, State and Local Taxation §§ 1115 et seq.

Judge WALKER concurring in part and dissenting in part.

Appeal by plaintiff from order entered 9 February 1995 by Judge George L. Wainwright in Onslow County Superior Court. Heard in the Court of Appeals 24 January 1996.

ONSLow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

*Roger A. Moore, for plaintiff-appellant.**Jeffrey S. Miller, for defendants-appellees.*

LEWIS, Judge.

On 18 September 1992, plaintiff County of Onslow filed the first of these tax foreclosure actions for late taxes due on four parcels of land owned by defendants. The total amount (principal and interest) due on all four parcels, as stated in the complaints, was \$1,298.88. Plaintiff subsequently served all defendants. The Phillips claim that, shortly thereafter, they attempted to pay the taxes but that plaintiff refused to accept their tender unless attorney's fees of \$1600 (\$400 per parcel) plus costs were paid to plaintiff's attorney. Defendants answered, filed a counterclaim, and demanded a jury trial. Plaintiff replied and moved to strike defendants' demand for jury trial. Plaintiff then moved for summary judgment on defendants' counterclaim. By order entered 9 February 1995, Judge George L. Wainwright denied plaintiff's motion for summary judgment and denied its motion to strike defendants' demand for jury trial. Plaintiff appeals. On 15 June 1995, plaintiff filed a petition for writ of certiorari seeking review of the order as to issues for which there is no appeal of right.

We first note that plaintiff seeks to appeal an interlocutory order. Ordinarily, an order denying summary judgment is not immediately appealable, unless, as here, the basis for the motion is governmental immunity. *Taylor v. Ashburn*, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). In addition to reviewing the immunity issue, for purposes of judicial economy, we grant plaintiff's petition for certiorari to address certain other issues raised in this appeal under N.C.R. App. P. 21(a)(1) (1996).

In assignment of error number one, plaintiff asserts that the doctrine of sovereign immunity bars defendants' counterclaim.

[1] In order to assess this issue, we must first examine the allegations made in the counterclaim. Defendants allege that plaintiff has contracted away its power of taxation by adding attorney's fees set by a private attorney, by requiring direct payment of the taxes and fees due to a private attorney, and by making the unpaid attorney's fees part of the tax lien. Defendants further allege that they tendered the taxes due, less the attorney's fees and costs, but that plaintiff refused to accept the payment. Defendants also allege, *inter alia*, that plaintiff's actions in refusing to accept their tender of taxes were "oppress-

ONslow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

sive, arbitrary, and overreaching” and have proximately caused them emotional distress and mental anguish. Plaintiff construes these allegations as an attempt to state claims for intentional and negligent infliction of emotional distress, and asserts, in assignments of error numbers 3 and 4, that defendants have not sufficiently alleged or offered facts supporting these claims.

The torts of intentional infliction of emotional distress and negligent infliction of emotional distress both require allegations, and ultimately, proof of facts showing that a complainant has suffered a “‘severe and disabling emotional or mental condition’” of the type “‘which may be generally recognized and diagnosed by professionals trained to do so.’” See *Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). Defendants have not alleged facts showing that the alleged distress was severe, nor is there any record evidence of severe emotional distress. The trial court should have granted summary judgment against defendants on their claims for intentional and negligent infliction of emotional distress.

[2] In their brief, defendants characterize their counterclaim as stating a claim under 42 U.S.C. § 1983 (“section 1983”) for deprivation of due process of law. Defendants seek damages and declaratory and injunctive relief. They assert that governmental immunity is not a defense to a section 1983 constitutional claim.

A county, like other units of local government, has no immunity for liability under section 1983. *Owen v. City of Independence*, 445 U.S. 622, 638, 63 L. Ed. 2d 673, 685-86 (1980).

To state a claim, as here, under section 1983, facts must be alleged showing that the governmental entity acted pursuant to a policy or custom which was the moving force behind the deprivation of rights. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-95, 56 L. Ed. 2d 611, 635-38 (1978). Defendants have satisfied this requirement by referring to plaintiff’s action in adding attorney’s fees to the tax lien as a “practice” and a “scheme.” Defendants have also alleged that plaintiff, by this practice, has violated their due process rights by arbitrarily adding the attorney’s fees to the tax lien without proper notice and hearing or opportunity to avoid the penalty. Since collection of this tax from a property owner is a deprivation of property, a taxing unit must provide due process of law. *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18,

ONslow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

36, 110 L. Ed. 2d 17, 35-36 (1990). We conclude that defendants have alleged sufficient facts to support a section 1983 claim.

[3] We further conclude that plaintiff county has not shown at summary judgment that it is entitled to judgment as a matter of law on this claim. See *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). The record evidence shows the following: The tax foreclosure complaints served on defendants stated a total of \$1298.88 in taxes (principal and interest) due on the four parcels. According to his deposition, Mr. Phillips attempted to tender the taxes (principal and interest) due as stated in the tax foreclosure complaints plus any penalties owed. Mr. and Mrs. Phillips testified there was no notice that the attorney's fees of \$1600 plus costs must be paid until they attempted to tender the taxes and after the foreclosure action had been filed. The \$1600 was assessed by the attorney to cover his fees, and the attorney's office, not plaintiff, informed Mr. and Mrs. Phillips of the amount of attorney's fees due.

The record evidence raises a genuine and material issue as to whether the Phillips were given proper notice that plaintiff had assessed \$1600 in attorney's fees. The record further shows that these fees were assessed without affording defendants an opportunity to be heard. The evidence also raises the issue of whether plaintiff properly followed the statutory procedure for collection of taxes and attorney's fees. Given this evidence, plaintiff is not entitled to summary judgment on defendants' section 1983 claim for violation of their due process rights.

We note that defendants' counterclaim also alleges violations of the North Carolina Constitution. Since neither party has briefed this issue, we leave it undisturbed.

In assignment of error number 5, plaintiff asserts that defendants may not proceed by counterclaim but are required to file a motion in the cause under N.C. Gen. Stat. section 105-374(i) (1995) for a determination of what constitutes a reasonable attorney's fee. We disagree. Plaintiff is the party seeking attorney's fees; if the burden is on any party to move for fees, it is on plaintiff, not defendants.

[4] In assignment of error number 6, plaintiff asserts that it acted properly under N.C. Gen. Stat. section 105-362(a) and N.C. Gen. Stat. sections 105-374(e) and 105-374(i) when it refused to release the tax lien against defendants' property until the attorney's fees were paid. We disagree. G.S. section 105-362(a) (1995) provides:

ONslow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

(a) General Rule.—The tax lien on real property shall continue until the principal amount of the taxes plus penalties, interest, and costs allowed by law have been fully paid.

G.S. section 105-374(e) (1995), provides, in pertinent part:

(e) Subsequent Taxes.—The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same real property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend the complaint to incorporate the subsequent taxes by specific allegation. In case of redemption before confirmation of the foreclosure sale, the person redeeming shall be required to pay, before the foreclosure action is discontinued, at least all taxes on the real property which have at the time of discontinuance become due to the plaintiff unit, plus penalties, interest, and costs thereon.

G.S. section 105-362(a) and 105-374(e), relied upon by plaintiff, do not specifically include attorney's fees as "costs." G.S. section 105-362(a) permits "costs allowed by law" to be added to the lien. An example of "costs allowed by law" are those allowed pursuant to N.C. Gen. Stat. section 105-369(d) (1995) which provides that the reasonable costs of advertising a tax lien on real property are deemed part of the tax owed. There is no comparable provision in Article 26 for attorney's fees.

G.S. section 105-374(i) defines "costs," as used "in this subsection (i)," as including "one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow." G.S. § 105-374(i) (emphasis added). Subsection (i) of this statute clearly contemplates that the attorney's fee in a foreclosure action is one awarded by the court in its discretion. It does not authorize a taxing unit to set the attorney's fee itself, and certainly there is no provision for a contracting attorney to set it. There is no provision for any person or entity automatically to make it part of the tax lien. Furthermore, G.S. section 105-374(i) specifically limits its definition of costs to that subsection. We conclude that these statutes do not entitle plaintiff to summary judgment on defendants' counterclaim.

[5] In assignment of error number 7, plaintiff asserts that defendants' counterclaim is barred by the anti-injunction provisions of N.C. Gen. Stat. section 105-267. The taxes sought by plaintiff against defendants' real property were imposed and these foreclosure actions were

ON SLOW COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

brought pursuant to statutory provisions found in Subchapter II of Chapter 105 of the General Statutes. By its terms, G.S. section 105-267 applies only to a tax “imposed in this Subchapter,” i.e., “Subchapter I. Levy of Taxes” under Chapter 105 of the General Statutes. It does not apply to matters dealt with in Subchapter II of Chapter 105. Accordingly, we hold that G.S. section 105-267 does not bar defendants from bringing this counterclaim.

However, there are comparable anti-injunction provisions applicable to taxes imposed under Subchapter II. As part of Subchapter II, these provisions, N.C. Gen. Stat. sections 105-379 (1995) and 105-381 (1995), do apply to the taxes imposed on defendants’ property under Subchapter II. G.S. section 105-379 provides, in pertinent part:

(a) Grounds for Injunction.—No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorized purpose.

In addition, G.S. section 105-381 provides that a taxpayer who seeks to defend against an illegal tax, a tax imposed for an illegal purpose, or a tax imposed through a clerical error may make a written demand to the governing body of the taxing unit stating his defense and requesting release of the tax claim. G.S. § 105-381(a)(2). This request may be made at any time prior to payment of the tax. *Id.* If within 90 days of the request the governing body has denied the request or has not taken action on the request, the taxpayer must pay the tax, and then, within three years of payment, may bring a civil action against the taxing unit for the amount claimed as provided in G.S. section 105-381(d). G.S. § 105-381(c)(1).

Payment of the tax, even an allegedly illegal tax, is a prerequisite for filing suit under this statute. However, here, there is evidence showing that defendants attempted to tender the taxes due as stated in the foreclosure complaint. The \$1,600 attorney’s fees claimed by plaintiff were not listed in the foreclosure complaint as taxes and were not “costs allowed by law” under G.S. section 105-362(a). Defendants were not required to pay the attorney’s fees assessed by plaintiff as a prerequisite to filing suit under G.S. section 105-381. Furthermore, defendants did not initiate this lawsuit. They have counterclaimed in response to the foreclosure suit by plaintiff. G.S. section 105-381 provides a mechanism by which a taxpayer can sue a taxing unit and prevent foreclosure without impeding the collection

ONslow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

of tax revenue needed for governmental functions. It should not be applied to preclude a counterclaim in a foreclosure proceeding. We hold that defendants were not required to comply with G.S. section 105-381 as a prerequisite to filing their counterclaim.

We note that plaintiff has not asserted anywhere that a counterclaim cannot be filed in a tax foreclosure action brought under G.S. section 105-374. Since plaintiff has abandoned this issue on appeal, *see* N.C.R. App. P. 10 and 28 (1996), we permit defendants to proceed on their counterclaim. However, by so holding, we do not hold that counterclaims generally are proper in tax foreclosure actions brought under G.S. section 105-374. *See Apex v. Templeton*, 223 N.C. 645, 646, 27 S.E.2d 617 (1943) (upholding dismissal of counterclaim in tax foreclosure action under former version of statute); *see also Graded School v. McDowell*, 157 N.C. 316, 72 S.E. 1083 (1911); and *Commissioners v. Hall*, 177 N.C. 490, 99 S.E. 372 (1919).

In assignment of error number 8, plaintiff assigns error to the trial court's denial of its motion pursuant to N.C.R. Civ. P. 12(f) to strike defendants' demand for jury trial. Since defendants have stated a claim for deprivation of their constitutional rights under section 1983, they are entitled to a trial by jury on this claim. *See Perez-Serrano v. DeLeon-Velez*, 868 F.2d 30, 32-33 (1st Cir. 1989). The trial court did not err in denying plaintiff's motion to strike defendants' demand for trial by jury.

We further note that, in its initial and amended replies to this counterclaim, plaintiff has not specifically addressed the section 1983 allegations. This may be due in part to the manner in which defendants have stated their section 1983 allegations and their lack of specific reference to the statute. On remand, plaintiff shall be given opportunity to amend its reply, if it chooses, to answer the section 1983 allegations.

Affirmed in part, reversed in part, and remanded.

Chief Judge ARNOLD concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I concur with the majority that the plaintiff is entitled to summary judgment on defendants' claims for intentional and negligent infliction of emotional distress. However, I dissent from the portion of the

ONslow COUNTY v. PHILLIPS

[123 N.C. App. 317 (1996)]

opinion which finds that plaintiff is not entitled to summary judgment on defendants' counterclaim for violation of their constitutional rights.

Summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). A movant may meet its burden by showing that (1) an essential element of the plaintiff's claim is nonexistent; or (2) based on discovery, the plaintiff cannot produce evidence to support an essential element of its claim; or (3) the plaintiff cannot surmount an affirmative defense which would bar the claim. *Watts v. Cumberland County Hosp. System*, 75 N.C. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). In the present case, the defendants have failed to allege any constitutional deprivation. I find no allegations in defendants' counterclaim that they have been deprived of their property. At most, defendants assert a possibility of future harm to their property if foreclosure occurs. Since defendants have not alleged any constitutional deprivation, it is unnecessary to reach the issue of immunity. Accordingly, I would hold that plaintiff is entitled to summary judgment on defendants' counterclaim in its entirety.

Although I would find that plaintiff is entitled to summary judgment on defendants' counterclaim, the defendants are not without a remedy in this case. The legislature has provided that "[t]he tax lien on real property shall continue until the principal amount of the taxes plus penalties, interest, and costs allowed by law have [sic] been fully paid." N.C. Gen. Stat. § 105-362(a) (1995). Further, the term "costs" is to be construed to include a reasonable attorney's fee. N.C. Gen. Stat. § 105-374(i) (1995). Defendants assert in their answer that the plaintiff should be required to accept their tender of payment of the taxes and interest due and that plaintiff's liens should be released without requiring payment of attorney's fees. The plaintiff is not authorized under N.C. Gen. Stat. § 105-374 to assess the \$1,600.00 in attorney's fees as part of the taxes and the collection of those fees cannot be the basis of any foreclosure action. Upon defendants' denial that attorney's fees were owed, it was incumbent upon the trial court to determine under N.C. Gen. Stat. § 105.374 whether plaintiff was entitled to an award of attorney's fees. Thereafter, upon payment by plaintiffs of the taxes and any court-ordered attorney's fees, they were entitled to have the tax liens cancelled on the four parcels of land in question.

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

STATE OF NORTH CAROLINA v. ROY LEE DAVIDSON, DEFENDANT

No. COA95-1189

(Filed 6 August 1996)

Homicide § 225 (NCI4th)—defendant as perpetrator—insufficiency of evidence

In a prosecution of defendant for second-degree murder, the evidence was insufficient to show that defendant was the perpetrator of the crime charged where it tended to show that defendant and the victim had an argument several days before the murder during which they threatened to kill each other; defendant heard a loud noise after he went to sleep which could have been a gunshot; defendant told an acquaintance during two separate arguments that he had killed the victim and he would do the same thing to the acquaintance; defendant told two other acquaintances that they would end up like the victim; the victim was found dead of a shotgun wound in a house which defendant owned and in which the victim lived; defendant and the victim were together, along with others, on the night of the murder; markings found on a fired shotgun shell found in defendant's house were consistent with the shotgun found in defendant's house; the same company manufactured the wadding found at the scene and the spent shotgun shell found in the gun; and a gunshot residue test found unusual amounts of barium and lead on defendant's hands which would be consistent with his having fired a gun in the hours before the test.

Am Jur 2d, Homicide § 435.

Judge EAGLES dissenting.

Appeal by defendant from judgment entered 7 June 1995 by Judge Preston Cornelius in Iredell County Superior Court. Heard in the Court of Appeals 16 May 1996.

Attorney General Michael F. Easley, by Associate Attorney General Melissa Taylor, for the State.

T. Michael Lassiter, P.A., by T. Michael Lassiter, for defendant-appellant.

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

WYNN, Judge.

Defendant Roy Lee Davidson appeals from his second degree murder conviction for the death of his roommate Booker T. Scott ("Scott").

The State's evidence tended to show the following: On 22 December 1990, the night before his death, Scott and defendant drank intoxicating beverages with several friends. Several people, including Dewey Campbell ("Campbell"), Timothy Miller ("Miller") and Deshawn Saddler ("Saddler"), entered and exited defendant's house during the course of the evening. Scott and defendant stayed up until approximately 5:00 a.m. before going to sleep.

Defendant awoke the next morning and noticed Scott lying on the couch. He left the house and came upon Campbell sometime between 8 and 9 a.m., as he walked back to the house. Both men entered the house and noticed that Scott was still lying on the couch. Campbell called out Scott's name. When Scott did not respond, Campbell assumed that he was asleep and went to the kitchen to have a drink of wine or beer with defendant. Defendant told Campbell that Scott had had a "rough night" and had been lying on the couch in the same position since five o'clock that morning.

After drinking with defendant for "a while", Campbell told defendant that it was strange for Scott to be asleep so long. Defendant told Campbell that Scott "might have Od'd" and that he might be dead. Campbell went over to Scott, and determined that he was not breathing. Defendant then left to get help while Campbell waited on the front porch.

At approximately 10:14 that morning, the Iredell County Emergency Medical Service ("EMS") paramedics arrived at the house. They found Scott lying on the couch, noticed a gunshot wound to his chest, pronounced him dead, and contacted the sheriff's department.

Gregory Johnson ("Johnson") was the first person from the Iredell County Sheriff's Department to arrive at the house. He spoke briefly with the EMS unit, then examined Scott's body. He immediately noticed a large hole in the center of Scott's chest and some blood around his shirt. He then searched for a weapon and found a sawed-off shotgun in the corner of the room where Scott's body was found.

Soon thereafter, defendant reentered the house because he wanted a drink. Johnson spoke with him and noticed that defendant

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

smelled like he had been drinking. Defendant told Johnson that he heard a loud noise during the night which may have been a gunshot.

Officer Bill Stamey ("Stamey") arrived soon after Johnson began speaking with defendant. He observed Scott's body and the shotgun. He then took a statement from defendant. Defendant told him that he had been drinking with Scott and Miller the previous night, and that they were in and out during the course of the evening. Defendant also told Stamey that Scott and Miller were arguing loudly, and as a result he left the room and went to sleep in another bedroom in the house. When he awoke a short time later, Miller had left and Scott was on the couch. Stamey took two subsequent statements from defendant which were similar to the first one given the morning that Scott's body was found.

Dr. Georgia Olympia, a pathologist, testified that she performed an autopsy on Scott, and determined that Scott died of a shotgun wound to the right side of his chest. Dr. Olympia testified that the shotgun was fired from within three feet of Scott.

Mr. Eugene Bishop ("Bishop"), a firearms identification expert, performed tests to determine if the shotgun found at the scene of the crime was the one used to shoot Scott. Bishop testified that he could not render an opinion as to whether the shotgun found at Davidson's house was the one used to kill Scott. Bishop further testified that the wadding found near Scott's body was manufactured by the same company which manufactured the spent shell found in the shotgun from the house.

Michael Creasy ("Creasy"), an expert in forensic chemistry, performed a gunshot residue test on wipings taken from defendant's hands at 5:50 p.m. on 23 December. Creasy testified that he could not render an opinion as to whether defendant had fired a gun in the hours leading up to the time his hands were wiped, although he found unusually high concentrations of barium and lead, two of the three elements he would expect to have found had defendant in fact fired a gun. On cross examination, Creasy testified that there are other ways in which defendant could have acquired the concentrations of barium and lead on his hands.

Campbell testified that defendant told him that he shot Scott, and that he would shoot Campbell as well. Campbell further testified that defendant later said that he "wouldn't do anything like that[,] you know I was joking." Miller and Saddler both testified that during argu-

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

ments with defendant, he told them that they would “end up like [Scott].”

At the close of all evidence, defendant moved to dismiss the charges against him. The trial court denied his motion and submitted the charge of second-degree murder to the jury. From his conviction resulting in a ten year sentence, defendant appeals.

On appeal, Davidson contends that the trial court erred by failing to grant his motion to dismiss because the evidence was insufficient to establish that he was the murderer of Scott. We agree, and therefore reverse Davidson’s conviction.

Upon a motion to dismiss by a defendant in a criminal case, the trial court “must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it.” *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). The trial court should deny a criminal defendant’s motion to dismiss “[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it.” *Id.* at 358, 368 S.E.2d at 383. Whether the evidence constitutes substantial evidence is a question of law for the Court. *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 902, *cert. denied*, — U.S.—, 130 L. Ed. 2d 429 (1994). Substantial evidence is evidence that is “existing and real, not just seeming or imaginary.” *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1982)). Substantial evidence is “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). The test of the sufficiency of the evidence to withstand a motion to dismiss,

[I]s the same whether the evidence is direct, circumstantial or both [W]hen the motion . . . calls into question the sufficiency of the evidence, the question for the court is whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

Powell, 299 N.C. at 99, 261 S.E.2d at 117.

Our Supreme Court has stated that in cases where the issue is whether the State has presented sufficient evidence to withstand defendant’s motion to dismiss, “[w]e find that it is much easier to

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

state the rule than to apply it. Each case turns on its own peculiar facts and a decision in one case is rarely controlling in another.” *State v. White*, 293 N.C. 91, 95, 235 S.E.2d 55, 58 (1977); *see also State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967). Nevertheless, prior cases can be instructive in determining whether a defendant’s motion to dismiss should have been granted in a given case. *White*, 293 N.C. at 95-96, 235 S.E.2d at 58.

In the instant case, defendant concedes that there was sufficient evidence presented to permit the jury to find that the offense charged—homicide occurring by use of a shotgun—was in fact committed. As a result, the only issue before this Court is whether sufficient evidence was presented that defendant was the perpetrator of the shooting. We hold that there was not.

Evidence in the instant case, in the light most favorable to the State, can be summarized as follows: Several days before the murder, defendant and Scott had an argument during which they threatened to kill each other; defendant heard a loud noise after he went to sleep, which could have been a gunshot; defendant told Campbell during two separate arguments that he killed Scott, and he would “do the same thing” to Campbell; defendant told Miller and Saddler during arguments that they would end up like Scott; Scott was found dead of a shotgun wound in a house which defendant owned and in which Scott lived; defendant and Scott were together, along with others, on the night Scott was killed; markings found on a fired shotgun shell found in defendant’s house were consistent with the shotgun found in defendant’s house; the same company manufactured the wadding found at the scene and the spent shotgun shell found in the gun; and, a gunshot residue test found unusual amounts of barium and lead on defendant’s hands which would be consistent with his having fired a gun in the hours before the test.

This evidence, taken together,

[E]stablishes a murder; and considered in the light most favorable to the State, shows that the defendant had the opportunity, means and perhaps the mental state to have committed this murder. Such facts, taken in the strongest view adverse to defendant, . . . excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party.

State v. Lee, 294 N.C. 299, 303, 240 S.E.2d 449, 451 (1978).

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

In *Lee*, our Supreme Court affirmed this Court's holding that the trial court should have granted defendant's motion to dismiss the murder charges against him despite the fact that the State's evidence tended to show that the defendant "beat the victim on two occasions just before her death, and . . . threatened to kill the victim a day or two before her death." *Id.* The Court in *Lee* conceded that the State's evidence may have been sufficient to establish the defendant's *mens rea*, but held that dismissal was nevertheless required because the State did not offer substantial evidence that defendant actually committed the act of murder, and "[t]he criminal act cannot be inferred from evidence of state of mind alone." *Id.*

The evidence of motive was substantially stronger in *Lee* than in the instant case. In *Lee*, there was evidence that the defendant beat the victim in the days before she was murdered. In the instant case, the evidence showed an argument wherein defendant and Scott threatened to kill each other. There was no evidence of actual violence before the murder. In both *Lee* and the case *sub judice*, there was little or no physical evidence that the defendant actually committed the murder.

In *Cutler*, 271 N.C. 379, 156 S.E.2d 679, the evidence tended to show that:

[T]he deceased was found in his home stabbed through the heart, lying in a pool of blood. Blood was found throughout the house and inside the defendant's abandoned pickup truck parked nearby. The defendant was seen driving his truck up the lane to the deceased's house on the morning of the murder. Later the same morning, the defendant appeared at the home of his uncle intoxicated and "bloody as a hog." The defendant had a bad gash on his head. The defendant's knife blade was bloody and a hair stuck in the blood on the knife was similar to the chest hair of the deceased. An expert testified that the blood under the deceased's body and the blood inside the defendant's truck came from different persons. The blood on the defendant's clothing was identified as the same type as that taken from the truck. The blood on the knife was human blood but could not be typed. The defendant told his uncle that "Joe [the deceased] had killed himself." Defendant was taken by a neighbor to the hospital and, en route, told the neighbor he "would rather get a pint of liquor and go back and see how Joe was than go to the doctor."

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

The physical evidence in *Cutler* was stronger than that in the instant case. In *Cutler*, the defendant was found with a knife blade which was bloody and had a hair stuck to it. The hair was similar to a chest hair of the deceased, who was murdered by being stabbed through the heart. The defendant himself was bloody and had a gash on his head. The defendant's truck had blood in it, which was not the blood of the deceased, but may have been defendant's. Despite the fact that the defendant was clearly in a violent altercation, and possessed a knife with a hair stuck to it similar to that of the victim, the Court in *Cutler* held:

[The evidence was] sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture. It may reasonably be inferred that the defendant was at the home of the deceased when the deceased came to his death, or shortly thereafter. However, it is not enough to defeat the motion for nonsuit that the evidence establishes that the defendant had an opportunity to commit the crime charged.

Cutler, 271 N.C. at 383, 156 S.E.2d at 682.

In the instant case, the physical evidence, in its entirety, consisted of the fact that a shotgun found in defendant's house *may* have been the gun used to kill Scott, and residue found on defendant's hands indicate that he *may* have fired a gun in the hours before the test, although the expert witness explicitly testified that he could not render an opinion as to whether Davidson had in fact fired a gun in that time frame. Such evidence is insufficient to remove the issue of defendant's guilt or innocence "from the realm of speculation and conjecture." See *Id.* As our Supreme Court stated in *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983), "[i]f . . . the evidence . . . is sufficient only to raise a suspicion or conjecture as to . . . the identity of the defendant as the perpetrator, the motion to dismiss must be allowed This is true even though the suspicion aroused by the evidence is strong."

Following the precedent of our Supreme Court, as we must, we conclude that defendant's conviction must be, and therefore is,

Reversed.

Judge SMITH concurs.

Judge EAGLES dissents.

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

Judge EAGLES dissenting.

The majority holds that the State did not present substantial evidence to support the finding that defendant committed the offense charged. I respectfully dissent.

In deciding whether to deny a defendant's motion to dismiss based on insufficiency of the evidence in a criminal case, the trial court must "view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). The State must have presented substantial evidence that supports a finding that the offense charged was committed and that defendant committed it. *Id.* at 358, 368 S.E.2d at 383. To support a finding that defendant committed the offense charged, the evidence must be sufficient to allow "a reasonable inference of defendant's guilt of the crime charged [to] be drawn from the evidence." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (emphasis omitted).

The evidence the State presented tends to show the following facts:

On 20 December 1990, defendant argued with the victim and threatened to kill him. Two days later, defendant and the victim were together at various times at defendant's house, where they both lived. Both were drinking intoxicating beverages and socializing with friends. By the early morning hours of 23 December 1990, the victim, known to carry a shotgun with him everywhere, had fallen asleep on a sofa in the front room of defendant's house. Later in the morning, the victim was found lying on that sofa, dead from a shotgun wound to the chest.

Defendant was in his house during the early morning hours of 23 December 1990. Defendant claims that he was asleep in another room and heard a noise like a stick falling, but did not investigate.

At trial, Campbell, a friend of defendant and the victim, testified that, after the victim's death, Campbell argued twice with defendant. During both of these arguments, defendant stated, "I killed [the victim], and I'll kill you too." Two other friends of defendant testified that defendant had warned them separately to "watch out" or they would "end up like [the victim]."

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

Special Agent Creasy, a forensic chemist with the State Bureau of Investigation, gave expert testimony establishing that he performed a gunshot residue analysis on hand wipes taken from defendant on the day of the victim's death. Creasy testified that, based on this analysis, he "could not reach a definitive opinion with regard to whether or not [defendant] could or could not have fired a weapon" on the day of the victim's death; however, he testified that his findings were unusual, in that tests revealed significant concentrations of two of the three chemical elements tested for in gunshot residue, and, given the location of residue found on defendant's hand, these concentrations did not indicate mere environmental contamination.

There was also expert testimony as to the proximity of the murder weapon to the victim at the time of death. Dr. Georgia Olympia, a pathologist who performed the autopsy on the victim, testified that the victim died from a shotgun blast which originated within three feet of the victim. Special Agent Bishop, a State Bureau of Investigations expert in firearms identification, corroborated Dr. Olympia's finding, testifying that, if the victim's shotgun was the murder weapon, the muzzle of the gun "had to be less than three feet away" from the victim when fired.

Bishop further testified as to whether the victim's shotgun was the murder weapon. On the day of the victim's death, police found the victim's shotgun in the front room, a distance of twelve to fourteen feet from the victim's body. In the shotgun was a spent shell casing. Bishop testified that this spent shell casing was manufactured by the same company as the wadding found in the victim's wound and this shell casing was of the same type as shotgun pellets found in the victim's wound. He also stated that he had compared the discharged shell found in the victim's gun to a similar shell test fired from the subject weapon and concluded that the two had similar markings. Bishop testified he could not determine whether the discharged shell had been fired by the victim's shotgun; however, he explained that it is not unusual for this comparison test to lead to uncertain results.

Considering all this evidence in the light most favorable to the State, there was substantial evidence presented that defendant committed the offense charged. The State presented evidence that the victim died in defendant's house from a shotgun wound to the chest; defendant was in the house at the time of the offense; a shotgun was found in the same room as the victim, but outside of his reach;

STATE v. DAVIDSON

[123 N.C. App. 326 (1996)]

defendant had access to the shotgun; tests were consistent with the shotgun being the murder weapon; defendant threatened to kill the victim just days before the victim's death; defendant later admitted to a witness that he had killed the victim; defendant knew the victim well; the victim was shot at close range; and the results of defendant's hand wipe analysis were consistent with defendant having fired a gun on the day of the victim's death. This evidence is sufficient to allow "a reasonable inference of defendant's guilt of the crime charged [to] be drawn from the evidence." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

The majority cites *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978) and *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967) to support its reversal of the trial court's judgment. Both are distinguishable in that in neither of those cases was there an admission of guilt from defendant. *Lee*, 294 N.C. 299, 240 S.E.2d 449; *Cutler*, 271 N.C. 379, 156 S.E.2d 679.

In *State v. Lambert*, 341 N.C. 36, 460 S.E.2d 123 (1995), there was evidence presented of an admission of guilt from defendant and as *Lambert* indicates, the sparsity of physical evidence in the case *sub judice* does not bar the Court from upholding the trial court's ruling. In *Lambert*, as in the case *sub judice*, defendant was on trial for murder and an issue on appeal was whether the trial court erred in denying defendant's motion to dismiss based on insufficiency of the evidence. *Id.* The evidence, viewed in the light most favorable to the State, was that the victim was shot in his trailer while sleeping; defendant, the wife of the victim, was in the trailer at the time; defendant had access to the murder weapon; the victim was planning to leave the defendant because of her alcohol and cocaine abuse; and defendant made self-incriminating statements, whereby she admitted to the crime. *Id.* The State was unable to find latent fingerprints on the murder weapon and gunshot residue tests on defendant's hand wipes produced negative results. *Id.* Despite the lack of physical evidence, our Supreme Court upheld the trial court's denial of defendant's motion to dismiss, holding that the State presented "substantial evidence adequate to support the conclusion by a reasonable mind that defendant committed the crime of murder." *Id.* at 43, 235 S.E.2d at 127.

For the reasons stated, I respectfully dissent.

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

STATE OF NORTH CAROLINA v. KEITH ERIC HUDSON, DEFENDANT

No. COA95-271

(Filed 6 August 1996)

1. Admiralty, Navigation, and Boating § 39 (NCI4th)— involuntary manslaughter—operating boat while intoxicated as lesser included offense

Operating a boat while intoxicated is a lesser included offense of involuntary manslaughter predicated upon that crime, since it satisfies the “culpable negligence” alternative within the definition of involuntary manslaughter, and every element of operating a boat while intoxicated, N.C.G.S. § 75A-10A, is embraced in the common law definition of involuntary manslaughter.

Am Jur 2d, Boats and Boating § 17.

Criminal Liability for injury or death caused by operation of pleasure boat. 8 ALR4th 886.

2. Admiralty, Navigation, and Boating § 39 (NCI4th); Homicide § 550 (NCI4th)— involuntary manslaughter charged—instruction on lesser offense of operating boat while intoxicated

Due process required the trial court to instruct on the lesser included offense of operating a boat while intoxicated as an alternative to the choices of either guilty or not guilty of involuntary manslaughter in that the evidence permitted the jury rationally to find him guilty of operating a boat while intoxicated and acquit him of involuntary manslaughter.

Am Jur 2d, Boats and Boating § 17; Homicide §§ 525 et seq.

Appeal by defendant from judgments entered 29 July 1994 by Judge Robert M. Burroughs, Sr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 October 1995.

Attorney General Michael F. Easley, by Assistant Attorneys General Joseph P. Dugdale, Robert T. Hargett, and Linda Fox for the State.

Theo X. Nixon, for defendant-appellant.

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

JOHN, Judge.

Defendant appeals convictions of three counts of involuntary manslaughter based upon violation of N.C. Gen. Stat. § 75A-10, "Operating boat . . . while intoxicated" (DWI boating). He contends the trial court erred in numerous respects, including its failure to submit DWI boating to the jury as a lesser included offense. We find this argument persuasive and award defendant a new trial.

The State's evidence at trial tended to show that on 6 June 1993, defendant, Amy Stevens (Stevens) and Jason Charlton (Charlton) traveled from defendant's home on Lake Wylie to the lakefront Bourbon Street Yacht Club (the club) in defendant's 19-foot Javelin bass boat. They arrived at approximately 9:00 p.m. During the course of the evening, defendant was observed consuming alcoholic beverages and socializing with friends, including Tracey Hamilton (Hamilton). Hamilton requested a ride in defendant's boat, and defendant consented because he had agreed to take Charlton and Stevens back across the lake that night. The four left the club at approximately midnight and headed south on the lake with defendant operating the boat.

That same evening, Rusty Hill (Hill) was traveling in a northerly direction on Lake Wylie in his 26-foot Chris-Craft cabin cruiser. Hill was proceeding at a cruising speed of approximately 18-22 miles per hour when he glanced towards the shore to look at a miniature lighthouse on property belonging to Ken Wilson (Wilson). As Hill directed his attention back to the water in front of him, his cabin cruiser collided with defendant's boat, sending the cruiser airborne. Hamilton, Stevens and Charlton were killed instantly as a result of the collision.

Defendant's uncontradicted testimony was that immediately before the accident, he had engaged the boat's idle device, or "hot foot," and allowed it to proceed at approximately 1-2 m.p.h. as he approached Wilson's lighthouse. He then retrieved a floatation device for Hamilton to sit on from a storage compartment near the front of the boat, and next bent down under the console to reach a shirt. He remembered nothing else except regaining consciousness in the hospital about one week later.

Although there was no actual witness to the collision, the defense presented unrefuted testimony from two accident reconstruction experts. Each stated that at the moment of impact, Hill's larger boat

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

was traveling at approximately 20 m.p.h. while defendant's boat was either merely idling in the water or moving at a speed of less than 2 m.p.h., and that the larger boat overran the smaller. A test performed by hospital staff indicated defendant was intoxicated, while no alcohol was detected in Hill's blood.

On 21 September 1993, defendant was charged with three counts of involuntary manslaughter in the deaths of Stevens, Charlton, and Hamilton. Guilty verdicts were returned in each case 29 July 1994. Upon judgment entered upon these verdicts and imposition of a sentence totaling nine years, defendant appeals.

Prior to addressing the merits of defendant's appeal, we observe his appellate brief is 42 pages in length, thereby exceeding the 35 page limit prescribed by N.C.R. App. P. 28(j). At oral argument, defendant's counsel proffered minimal justification for this rule violation. Consequently, pursuant to our authority under N.C.R. App. P. 25(b), we impose upon counsel a fine and reimbursement of copying expenses in a total amount of \$500.00, to be paid by counsel personally.

Turning to defendant's appeal, and notwithstanding objection by the State, we exercise our discretion, *see* N.C.R. App. P. 2, to consider defendant's argument that the trial court erred by failing to submit to the jury the lesser included offense of DWI boating.

Resolution of defendant's argument requires a two-part analysis: (1) whether DWI boating is indeed a lesser included offense of involuntary manslaughter; and (2) if so, whether as a matter of law defendant was entitled to an instruction on the lesser offense. *See State v. Owen*, 111 N.C. App. 300, 308, 432 S.E.2d 378, 384 (1993). Although the parties in their respective briefs appear to assume an affirmative response to the first question, our research reveals no case law resolving this specific issue. *See State v. Lackey*, 71 N.C. App. 581, 584-85, 323 S.E.2d 32, 35 (1984), concurring opinion of Becton, J. ("Defendant could have been convicted of both [involuntary manslaughter and DWI] at a joint trial. Whether judgment would have had to have been arrested on one of the convictions is a question we need not decide.").

[1] We commence our examination of the first inquiry by noting the "long-standing rule in this jurisdiction," *State v. Weaver*, 306 N.C. 629, 637, 295 S.E.2d 375, 379 (1982), *overruled in part on other grounds*, *State v. Collins*, 334 N.C. 54, 61, 335 S.E.2d 437, 455 (1993), "that a

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

lesser included offense is one in which the greater offense contains all of the essential elements of the lesser offense.” *Id.* Such determination is made “on a *definitional*, not a factual basis.” *Id.* at 635, 295 S.E.2d at 379 (emphasis in original).

However, this definitional standard was arguably relaxed somewhat in *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), wherein the Court held larceny to be a lesser included offense of armed robbery, notwithstanding the absence of complete overlap in elements. *Id.* at 518, 369 S.E.2d at 819. The Court based its decision in part on the “natural,” *id.* at 514, 369 S.E.2d at 817, or “special relationship,” between the two offenses. *Id.* at 516, 369 S.E.2d at 818. Also deemed persuasive were

[t]he worthy goals of economy, efficiency, accuracy and fairness in judicial proceedings . . . by placing all options raised by . . . the evidence before the same jury in a single trial.

Id. at 518, 369 S.E.2d at 819. Nonetheless, absent a specific decision to the contrary, we conclude that the stricter “definitional” approach of *Weaver* remains applicable, see *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988) (citing *Weaver*, “[i]n determining whether one offense is a lesser included offense of another, we apply a definitional as opposed to a transactional test”), and proceed to an examination of the respective definitions of DWI boating and involuntary manslaughter.

The offense of DWI boating, codified in G.S. § 75A-10, provided in pertinent part at the time of the collision *sub judice* that:

(b1) No person shall operate any motorboat or motor vessel while underway on the waters of this State:

(1) While under the influence of an impairing substance,

or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the boating, an alcohol concentration of 0.10 or more.

....

The relevant definitions contained in G.S. 20-4.01 shall apply to this subsection. . . .

G.S. § 75A-10 (1989) (emphasis added.)

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

N.C. Gen. Stat. § 20-4.01(24a) (1991) defines “Offense Involving Impaired Driving” as, *inter alia*, any of the following offenses:

a. Impaired driving under G.S. 20-138.1.

b. Death by vehicle under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially equivalent offense under previous law.

c. Second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially equivalent offense under previous law.

N.C.G.S. § 14-18 classifies involuntary manslaughter as a Class H felony, and the offense is defined as

the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission.

State v. McGill, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985).

Both driving while impaired (DWI) in violation of G.S. § 20-138.1 and DWI boating under G.S. § 75A-10, the latter by virtue of essentially identical elements and of incorporation through statutory reference, *see* G.S. § 75A-10(b1) and G.S. § 20-4.01(24a), constitute as “a matter of law . . . culpable negligence.” *McGill*, 314 N.C. at 637, 336 S.E.2d at 93. As such, each offense satisfies the “second alternative” to involuntary manslaughter. *Id.* at 637, 336 S.E.2d at 92. Moreover, when, as alleged in the instant case, “death is caused by one who was driving under the influence of alcohol,” our Supreme Court has required the existence of “two elements . . . for the successful prosecution of [involuntary] manslaughter: a willful violation of N.C.G.S. 20-138 and the causal link between that violation and the death.” *Id.* at 637, 336 S.E.2d at 93. *See also State v. Moore*, 107 N.C. App. 388, 397, 420 S.E.2d 691, 697, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992) (“[t]he charge of involuntary manslaughter required the State to prove (1) defendant was driving a motor vehicle, (2) on a highway, (3) under the influence of an impairing substance causing appreciable impairment of his normal mental and bodily functions [the elements of driving under the influence pursuant to G.S. § 20-138.1 (1989)], and (4) [defendant’s] impaired driving proximately but unintentionally caused the death of [the victim.]”).

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

Measurement of the foregoing principles according to the test of *Weaver*, *i.e.*, whether the greater offense contains all of the essential elements of the lesser offense, *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379, mandates the conclusion that DWI boating is a lesser included offense of involuntary manslaughter predicated upon that crime. As noted above, DWI and DWI boating satisfy the “second alternative” or “culpable negligence” within the definition of “involuntary manslaughter.” See *McGill*, 314 N.C. at 637, 336 S.E.2d at 92-93. Moreover, in order to sustain a conviction for involuntary manslaughter by DWI, it is necessary to establish the elements of DWI and that the commission of that offense was the proximate cause of death. See *Moore*, 107 N.C. App. at 397, 420 S.E.2d at 697. Hence the greater offense of involuntary manslaughter contains each essential element of the lesser charge of DWI. See *State v. Freeman*, 31 N.C. App. 93, 97, 228 S.E.2d 516, 519, *disc. review denied*, 291 N.C. 449, 230 S.E.2d 766 (1976) (misdemeanor death by vehicle, pursuant to G.S. § 20-141.4, is a lesser included offense of involuntary manslaughter because “every element of G.S. 20-141.4 [is] embraced in the common law definition of involuntary manslaughter”).

In the case *sub judice*, the offense of DWI boating is likewise included within the crime of involuntary manslaughter. “Every element of [G.S. 75A-10A—DWI boating] is embraced in the common law definition of involuntary manslaughter,” see *Freeman*, 31 N.C. App. at 97, 228 S.E.2d at 519, and the latter offense contains the additional element of “the unintentional killing of a human being without malice.” See *McGill*, 314 N.C. at 637, 336 S.E.2d at 92; see also *State v. Williams*, 90 N.C. App. 614, 621, 369 S.E.2d 832, 837, *disc. review denied*, 323 N.C. 369, 373 S.E.2d 555 (1988) (felony death by vehicle not lesser offense included within involuntary manslaughter predicated upon driving while impaired as each requires identical essential elements, to wit: willful violation of G.S. §20-138.1, and causal link between violation and death), and *Lackey*, 71 N.C. App. at 584, 323 S.E.2d at 34 (because intoxication is element of involuntary manslaughter, trial court erred by using defendant's intoxication as aggravating factor for sentencing purposes).

In the foregoing context, we observe that a majority of jurisdictions which have considered the issue have held that DWI constitutes a lesser included offense of involuntary manslaughter. See *Mayfield v. State*, 612 So.2d 1120, 1125-26 (Miss. 1992) (crime of aggravated driving under the influence a lesser included offense of crime of involuntary manslaughter by culpable negligence due to “inherent

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

relationship” existing between the two offenses); *State v. Adams*, 744 P.2d 833, 837 (Kan. 1987) (driving while under the influence of alcohol a lesser included offense of involuntary manslaughter because “[b]y proving all of the elements necessary to establish involuntary manslaughter, the State necessarily proved each element of the crime of driving while under the influence of alcohol,” thereby precluding “driving while under the influence of alcohol from being [merely] a ‘factually related offense.’ ”); *Duncan v. State*, 358 S.E.2d 910, 911 (Ga. 1987) (driving under the influence “a lesser included offense of first degree vehicular homicide” as “[p]roof of the elements of [the greater offense] necessarily requires proof of the elements of [the lesser offense.]”); *State v. Sondermann*, 812 S.W.2d 275, 275-76 (Mo. 1991) (by statute, “state could not prove its case [of involuntary manslaughter] without necessarily proving the driving while intoxicated charge,” and latter is thus a lesser included offense.); *contra Ange v. Commonwealth*, 234 S.E.2d 64, 65 (Va. 1977) (“involuntary manslaughter and drunk driving, are not the same either in law or in fact[,] [n]or is one a lesser degree of the other.”)

[2] Having held violation of G.S. § 75A-10 (DWI boating) to constitute a lesser included offense of involuntary manslaughter grounded upon contravention of the statute, we proceed to a consideration of whether defendant was entitled to jury consideration of the lesser included offense. *See Owen*, 111 N.C. App. at 308, 432 S.E.2d at 384.

It is well-established that the jury must be instructed as to a lesser-included offense of the crime charged when there is evidence from which the jury could find that the defendant committed the lesser offense. *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995). The focus is on “ ‘what the state’s evidence tends to prove.’ ” *State v. Brown*, 339 N.C. 426, 439, 451 S.E.2d 181, 189 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 46 (1995) (citation omitted). If the State’s evidence meets its burden of proving each element of the charged offense and no evidence negates these elements save the “ ‘defendant’s denial that he committed the offense,’ ” the jury should not be instructed on the lesser-included offense. *Id.* (citation omitted).

However, “where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction,” *Beck v. Alabama*, 447 U.S. 625, 634, 65 L. Ed. 2d 392, 401 (1980) (emphasis in original), rather than acquitting him altogether. *Conaway*, 339 N.C. at

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

514, 453 S.E.2d at 841 (citing *Beck*.) Accordingly, due process requires an instruction on a third option, *i.e.*, the lesser included offense, if “ ‘the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.’ ” *See Beck*, 447 U.S. at 635, 65 L. Ed. 2d at 401 (citation omitted). *See also Conaway*, 339 N.C. at 514, 453 S.E.2d at 841.

In the case *sub judice*, to successfully prosecute defendant for involuntary manslaughter predicated upon DWI boating, the state was required to prove: (1) a willful violation of G.S. § 75A-10, and (2) a causal link between that violation and the deaths of Stevens, Charlton and Hamilton. *See McGill*, 314 N.C. at 637, 336 S.E.2d at 93. This causal element “between the breach and the death” has been characterized as an indispensable component, “driving under the influence [in itself not being] sufficient to sustain a conviction of manslaughter.” *Id.* at 636, 336 S.E.2d at 92. *See also State v. Jones*, 290 N.C. 292, 298, 225 S.E.2d 549, 552 (1976) (proximate cause must be established to warrant conviction of homicide); and *State v. Lowery*, 223 N.C. 598, 603, 27 S.E.2d 638, 641 (1943) (although evidence supported defendant’s intoxication, none linked this misconduct to fatal accident which “is essential to a prosecution for involuntary manslaughter”).

A fair review of the record herein results in the conclusion that while the State’s evidence was ample to support a jury determination that defendant violated G.S. § 75A-10, the causal connection between violation of the statute and the deaths of Stevens, Charlton and Hamilton “remain[ed] in [substantial] doubt.” *See Conaway*, 339 N.C. at 514, 453 S.E.2d at 841. We note in particular inquiries by the jury to the trial court during deliberations regarding “the law . . . as it relates to [DWI boating],” the definition of culpable negligence, and the definition of proximate cause. Hence, under *Beck* and *Conaway*, because “defendant [was] plainly guilty of *some* offense,” the jury likely resolved its doubts in favor of conviction of involuntary manslaughter, *see Beck*, 447 U.S. at 634, 65 L. Ed. 2d at 401, rather than acquitting defendant altogether. *See Conaway*, 339 N.C. at 514, 453 S.E.2d at 841. Due process therefore required the trial court to instruct on the lesser included offense of DWI boating as an alternative to the choices of either guilty or not guilty of involuntary manslaughter, in that “ ‘the evidence . . . permit[ed] [the] jury rationally to find him guilty of [DWI boating] and acquit him of [involuntary manslaughter].’ ” *Beck*, 447 U.S. at 635, 65 L. Ed. 2d at 401. *See also Conaway*, 339 N.C. at 514, 453 S.E.2d at 841, and *State v. Collins*, 334 N.C. 54,

STATE v. HUDSON

[123 N.C. App. 336 (1996)]

63, 431 S.E.2d 188, 193 (1993) (failure to instruct jury on lesser included offense plain error where sufficient proof of causation element remained in doubt). This error thus prejudiced defendant, and we are constrained to award him a new trial. *See* N.C. Gen. Stat. §§ 15A-1442(4)(d) and 15A-1443(b).

Prior to concluding, we emphasize that our holding does not address application of the principle of double jeopardy with regards to the sequence and manner in which involuntary manslaughter and the lesser included offense of DWI boating are prosecuted. That issue is not before us. Suffice it to interject, however, that as DWI boating is a misdemeanor, G.S. §§ 75A-10 and 20-138.1(d), and thus usually tried in district court, N.C. Gen. Stat. § 7A-272(a), and involuntary manslaughter is a Class H felony, G.S. § 14-18, over which Superior Court has jurisdiction, N.C. Gen. Stat. § 7A-271(a), prosecutors anticipating prosecution of the felony would be prudent to exercise caution and restraint regarding prior trial of the misdemeanor in district court. *See State v. Revelle*, 301 N.C. 153, 162, 270 S.E.2d 476, 481 (1980), *overruled in part on other grounds*, *State v. White*, 322 N.C. 506, 517, 369 S.E.2d 813, 818 (1988) (“A person’s right to be free from double jeopardy is violated not only when one is tried for and convicted of offenses which are in law and fact identical, but also when one is charged and convicted of two offenses, one of which is a lesser included offense of the other, where both offenses arose out of the same series of events.”); *see also State v. McKenzie*, 292 N.C. 170, 175, 232 S.E.2d 424, 428 (1977) (court approves defendant’s “substantive position” that Constitutional protection against double jeopardy precludes State from subsequently bringing involuntary manslaughter charge predicated upon driving under the influence against defendant previously tried in district court for driving under the influence but convicted only of lesser offense of driving with blood alcohol content of .10 percent), and *State v. Griffin*, 51 N.C. App. 564, 566, 277 S.E.2d 77, 77 (1981) (pursuant to constitutional protection against double jeopardy, defendant may not be charged with death by vehicle predicated upon failure to yield right-of-way where defendant previously plead guilty to latter charge).

As defendant’s remaining assignments of error likely will not occur upon retrial, we decline to discuss them.

New Trial.

Judges LEWIS and WYNN concur.

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

RICHLAND RUN HOMEOWNERS ASSOCIATION, INC. PLAINTIFF, v. CHC DURHAM CORPORATION, F/K/A TIMCO, INC., F/K/A/ DURHAM CORPORATION, F/K/A/ RICHLAND PROPERTIES, INC. AND CAPITAL HOLDING CORPORATION, DEFENDANTS

No. COA94-1392

(Filed 6 August 1996)

1. Limitations, Repose, and Laches § 152 (NCI4th)— failure to plead compliance with statute of repose—action insufficient as matter of law

Because plaintiff failed to specially plead that its action was brought within the applicable statute of repose, plaintiff's cause of action is insufficient as a matter of law.

Am Jur 2d, Limitation of Actions §§ 463 et seq.

2. Housing, and Housing Authorities and Projects § 52 (NCI4th)— plaintiff not real party in interest—failure to correct by amendment—summary judgment for defendant proper

The "Unit Ownership Act," N.C.G.S. § 47A-1 *et seq.*, applied in this case so that only the board of directors or the manager, not the homeowners association, could bring this action on behalf of the aggrieved property owners; furthermore, plaintiff had almost three months from the filing of defendant's motion to dismiss for lack of standing to sue and the hearing to attempt to substitute the real party in interest but failed to do so.

Am Jur 2d, Condominiums and Co-Operative Apartments §§ 1-7.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 9 September 1994 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 September 1995.

Plaintiff-appellant Richland Run Homeowners Association, Inc. (true name "Richland Run Condominium Association, Inc.") filed this action 20 April 1994 in an attempt to recover from defendants for alleged defective materials and improper installation of siding used in the construction of the Richland Run Condominiums. Defendants

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

moved to dismiss the complaint on the grounds of: 1) insufficiency of service of process; 2) the claims were barred by the applicable statutes of limitations and repose; 3) no such corporation by the name of "Richland Run Homeowners Association, Inc." was listed in the records of the Secretary of State; and 4) a homeowners association was not a real party in interest and had no standing to bring the action. In support of the motion, defendants filed the affidavit of Joel Brown, former president of Richland Properties, Inc.

After service of defendants' motion, plaintiff moved to amend the caption and body of its complaint to reflect its true corporate name. Plaintiff later withdrew this motion and filed a second motion to amend the complaint to reflect its true name and to also add an allegation that Richland Properties, Inc. was the initial seller of the common areas of the Richland Run Condominiums. In support of its second motion and in opposition to defendants' motion to dismiss, plaintiff filed the affidavits of Julien Rattelade, community manager for Richland Run Condominiums, and Robert Speed, a civil engineer who inspected the siding. Attached to the affidavits were plaintiff's articles of incorporation and bylaws, the declaration of condominium, various correspondence between the parties, and a copy of Speed's inspection report.

The trial court heard all pending motions of the parties on 22 August 1994. After considering the motions, pleadings, affidavits of record, and the arguments of the parties, the trial court granted defendants' motion to dismiss with prejudice in an order entered 9 September 1994. The court found, in part, that: 1) plaintiff's claims were barred by the applicable statutes of limitations; 2) plaintiff failed to comply with all conditions precedent to maintaining its cause of action; 3) plaintiff failed to show it had standing to assert its claims against defendants; and 4) plaintiff's motion to amend its complaint was brought with undue delay, was futile, and constituted a repeated failure to cure defects. From the order dismissing its claims, plaintiff appeals.

Wyrick, Robbins, Yates & Ponton, L.L.P., by Samuel T. Wyrick, III, Roger W. Knight, Bruce C. Johnson, and Lee M. Whitman, for plaintiff-appellant.

Wyche & Story, by N. Hunter Wyche, Jr. and Claire B. Casey, for defendant-appellees.

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

McGEE, Judge.

Although the order of the trial court purports to be a dismissal of plaintiff's claims, because the court considered matters outside of the pleadings, the order is actually a grant of summary judgment for defendants. A motion to dismiss for failure to state a claim is converted to a N.C.R. Civ. P. 56 motion for summary judgment when matters outside of the pleadings are presented to and not excluded by the trial court. *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). In this case, the order clearly shows the court considered the affidavits submitted by the parties in making its decision. Since the affidavits were not incorporated by reference into the pleadings pursuant to N.C.R. Civ. P. 10(c), the affidavits are matters outside of the pleadings. Consideration by the trial court of the parties' affidavits and supporting documents converted the motion to dismiss into a motion for summary judgment.

Plaintiff suffered no prejudice by treating the motion to dismiss as one for summary judgment. Defendants filed their motion and supporting affidavit in May 1994. Since the court did not hear the motion until August 1994 and because the motion specifically stated the grounds upon which defendants sought relief, plaintiff had ample time to prepare to defend the motion and present supporting evidence. Plaintiff did in fact file two supporting affidavits and accompanying documents. Further, by attending and participating in the hearing without objection or without requesting a continuance, plaintiff waived any right to object to the summary judgment hearing on the ground of lack of notice. *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667-68, 248 S.E.2d 904, 907 (1978).

Because the court's order acted as a grant of summary judgment for defendants, on appeal this Court must affirm if there are any grounds upon which to sustain the granting of summary judgment. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). After reviewing the record, we find there are grounds to sustain the granting of summary judgment and affirm.

I.

[1] The trial court held that: "Plaintiff's complaint . . . fails to state claims upon which relief can be granted in that Plaintiff failed to comply with all conditions precedent to maintaining the alleged causes of action against Defendants." The applicable statute of repose for plaintiff's cause of action is six years. N.C. Gen. Stat. § 1-50(5)(a). This

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

statute is substantive in nature and requires as a condition precedent that a plaintiff establish that the action has been brought within the six-year period. *Sink v. Andrews*, 81 N.C. App. 594, 597, 344 S.E.2d 831, 833 (1986). This Court has held that under North Carolina law, statutes of repose are conditions precedent which must be specially pled pursuant to N.C.R. Civ. P. 9(c). *Tipton & Young Construction Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118, 446 S.E.2d 603, 605 (1994), *affirmed per curiam*, 340 N.C. 257, 456 S.E.2d 308 (1995). If a plaintiff does not aver compliance with a condition precedent, such as a statute of repose, then the plaintiff's case is insufficient as a matter of law. *Id.*

Plaintiff failed to allege in its complaint when the last act or omission of defendants or substantial completion of the construction of the condominiums occurred. Plaintiff also failed to allege that the last act or omission or substantial completion of the construction, whenever it occurred, occurred within six years prior to the filing of this action. However, plaintiff argues in its brief that even if the action was filed outside of the six-year statute of repose, this case falls within the exception contained in G.S. 1-50(5)(d). Nevertheless, plaintiff also failed to specially plead in its complaint any grounds to show the exception applied in this case or any other grounds to show the six-year statute of repose should not apply. Under this Court's holding in *Tipton*, because plaintiff failed to specially plead that its action was brought within the applicable statute of repose, plaintiff's cause of action is insufficient as a matter of law.

II.

[2] The trial court also held that: "Plaintiff has further failed to show that it has standing to assert its claims against Defendants."

"[I]t is elementary that the substantive issues cannot be considered unless the party raising them has the capacity to do so." *Property Owners' Assoc. v. Current and Property Owners' Assoc. v. Moore*, 35 N.C. App. 135, 136, 240 S.E.2d 503, 505 (1978). If a party is not a natural person, it must affirmatively allege its legal existence and capacity to sue. N.C.R. Civ. P. 9(a). Evidence in the record and presented to the trial court shows the plaintiff was incorporated in October 1985 under the name of "Richland Run Condominium Association, Inc." as a homeowners association for Richland Run Condominiums. As stated in the declaration establishing the condominium, and because of the date of incorporation, the association is

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

governed by N.C. Gen. Stat. § 47A-1 *et. seq.*, commonly known as the “Unit Ownership Act” (the Act). Under the Act, any cause of action relating to common areas and facilities is to be brought by “the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two or more of the unit owners, as their respective interests may appear” N.C. Gen. Stat. § 47A-26.

In construing who may bring an action under the Act, this Court has said:

Where the legislature has specifically designated certain statutory procedures, it has by implication excluded other procedures. To hold . . . that the statutory designation of parties who may maintain an action is merely illustrative, would make the statutory designation meaningless and contrary to both its implication and the rule of strict construction. This is especially so since the corporation here exists by virtue of statute and operates under the statutory scheme established by G.S. Chapter 47A

Laurel Park Villas Homeowners Assoc. v. Hodges, 82 N.C. App. 141, 143, 345 S.E.2d 464, 465-66, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986) (citation omitted). As in *Laurel Park*, we find nothing in plaintiff’s articles of incorporation and bylaws giving the homeowners association the power to bring this action. The bylaws give the board of directors the power to “enforce by any legal means or proceedings” the provisions of the bylaws and articles of incorporation and to “hir[e] attorneys and other professionals.” The bylaws do not address whether the plaintiff association has the power to bring an action such as the cause of action in this case. Nor has plaintiff alleged other grounds which might give the homeowners association standing in this case. Therefore, the Act controls and only the board of directors or the manager, not the homeowners association, may bring this action on behalf of the aggrieved property owners. *See Laurel Park*, 82 N.C. App. at 143-44, 345 S.E.2d at 465-66 (where plaintiff homeowners association has not been given power to bring suit, association has not alleged it owned any land, association has not alleged that the action is maintained by its board of directors or manager, and no aggrieved owners are involved, association has no standing and action must be dismissed).

Plaintiff argues it could have cured the lack of standing if the trial court had granted its motion to amend the complaint. We disagree. The motion to amend and the proposed amended complaint show that had the motion been granted, the caption and body of the com-

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

plaint would reflect plaintiff's true corporate name. However, the plaintiff homeowner's association, even under its true name, would not have been the real party in interest. "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Insurance Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d 206, 209, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977).

Notwithstanding the fact that plaintiff's proposed amendment would not have cured its lack of standing, plaintiff argues in its brief that it should have been allowed to amend its complaint pursuant to N.C.R. Civ. P. 17 to reflect the real party in interest, and that the amendment "would have included all information about the parties and their organizational history *that became clear following the hearing.*" (emphasis added). Rule 17 states, in part:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest

N.C.R. Civ. P. 17(a). However, based on the facts of this case, the trial court did not err by refusing to allow plaintiff to amend the complaint.

Plaintiff originally alleged in its complaint that it was incorporated in 1989 under N.C. Gen. Stat. § 47C-1-101 *et. seq.*, commonly known as the "North Carolina Condominium Act." Under N.C. Gen. Stat. § 47C-3-102(4), a homeowners association may institute litigation in its own name regarding matters affecting the condominium. However, as discussed above, the evidence showed plaintiff was actually incorporated in 1985 under the Unit Ownership Act, which requires that litigation be instituted by the association's board of directors or manager. Upon discovering this information, defendants filed their motion to dismiss. One of the grounds for the motion was that "a homeowner's association is not the real party in interest to the claims asserted in the complaint and is not authorized to bring this action." Therefore, when the motion was filed and served, plaintiff was on notice of defendants' objection to plaintiff's capacity to bring this action.

Rule 17 requires that a party have a reasonable time after an objection to substitute or join the real party in interest. Here, plaintiff

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

had almost three months from the filing of the motion until the hearing to attempt to substitute the real party in interest. Plaintiff did attempt to amend the complaint to reflect its true name and date of incorporation. However, none of the proposed amendments addressed the question of the real party in interest, and in fact, the proposed amended complaint continued to allege that plaintiff was incorporated under the North Carolina Condominium Act rather than the Unit Ownership Act. N.C. Gen. Stat. § 47C-1-102(a) states that the North Carolina Condominium Act only applies to condominiums created after 1 October 1986. The evidence shows plaintiff was created in October 1985. Likewise, the affidavits and materials submitted to the trial court by plaintiff show that plaintiff was governed by the Unit Ownership Act. Based upon defendants' objection to plaintiff's capacity to bring this action, combined with plaintiff's possession of its own bylaws and articles of incorporation, plaintiff could have and should have discovered in the three months between the motion and the hearing that its board of directors was the party with standing to bring this action. Plaintiff's argument that this information and plaintiff's organizational history "became clear after the hearing" rings hollow. Therefore, under the facts of this case, plaintiff had a reasonable time to substitute the real party in interest as required by Rule 17. When plaintiff failed to attempt to correct the problem after a reasonable time, the court did not abuse its discretion by granting defendants' motion. Further, plaintiff's right to amend the complaint terminated upon entry of judgment. *See Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987) (plaintiff's right to amend terminates upon dismissal unless judgment is set aside or vacated under Rule 59 or Rule 60).

Because we find that plaintiff did not specially plead compliance with a condition precedent and also had no standing to bring this action, we do not reach the issues of whether the trial court properly found that plaintiff's claims were barred by the applicable statutes of limitation and repose. For the reasons stated, the order of the trial court is affirmed.

Affirmed.

Judge WYNN concurs.

Judge GREENE dissents.

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

Judge GREENE dissenting.

I disagree with the majority that the trial court correctly dismissed the complaint on the basis that the plaintiff failed to specifically plead compliance with the applicable statute of repose. Our courts have repeatedly held that the plaintiff has the burden of *proving* “the condition precedent that its cause of action is brought” within the period of the applicable statute of repose. *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 426, 391 S.E.2d 211, 213, *disc. rev. denied to defendants and allowed to plaintiff*, 327 N.C. 426, 395 S.E.2d 674 (1990), *appeal by plaintiff withdrawn*, 328 N.C. 329, 402 S.E.2d 826 (1991); *see e.g., Bolick v. American Barmag Corp.*, 306 N.C. 364, 370, 293 S.E.2d 415, 420 (1982). I do not read Rule 9(c) as requiring the *pleading* of conditions precedent. Indeed this Court has specifically held that Rule 9(c) only “authorizes and encourages the general averment of conditions precedent.” *Plemmons v. City of Gastonia*, 62 N.C. App. 470, 475, 302 S.E.2d 905, 908, *disc. rev. denied*, 309 N.C. 322, 307 S.E.2d 165 (1983); *see* 1 G. Gray Wilson, *North Carolina Civil Procedure* § 9-4 (2d ed. 1995) (hereinafter *Wilson*) (conditions precedent more properly classified as Rule 8(c) affirmative defenses). I am aware of the language in *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118, 446 S.E.2d 603, 605 (1994), *aff’d per curiam*, 340 N.C. 257, 456 S.E.2d 308 (1995), which states that “statutes of repose are conditions precedent which must be specially pled.” The cases cited by the *Tipton* court in support of that statement, however, only support the principle that statutes of repose are conditions precedent and that the plaintiff has the burden at trial of proving that the claim is brought within the appropriate statute of repose. Furthermore, the statement made in *Tipton* was not necessary for the resolution of that case and thus *obiter dictum* in that the Court held that the plaintiff “has not produced any evidence of compliance with” the statute of repose. *Id.* at 119, 446 S.E.2d at 605. In any event, even if Rule 9(c) is construed to require pleading of the condition precedent, the complaint, through certain exhibits attached, alleges that the condominium complex was completed in 1986. Construing the complaint liberally, *see Wilson* § 9-4 (“courts should be hesitant to enforce [Rule 9(c)] strictly”), the allegations sufficiently comply with Rule 9.

There is the separate question of which statute of repose applies. The plaintiff argues that section 1-50(5)(d) applies so as to create an exception to the six year statute (section 1-50(5)(a)) and gives rise to a ten year statute of repose pursuant to section 1-52(16). The major-

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

[123 N.C. App. 345 (1996)]

ity refuses to address this argument on the basis that the plaintiff “failed to specially plead in its complaint any grounds to show [that section 1-50(5)(d)] applied in this case.” Again, I do not agree. The plaintiff has the burden of proving that the exception applies but there is no requirement that this be pled. Even if there is such a requirement, I believe that when the complaint is construed liberally, the facts supporting use of the exception have been sufficiently pled.

Finally I also disagree that dismissal of the complaint was proper on the grounds that the claim was not brought in the name of the real party in interest. Rule 17(a) expressly states that “[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection.” N.C.G.S. § 1A-1, Rule 17(a) (1990). When a case is not brought in the name of the real party in interest “the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court.” *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978). “This provision is designed to avoid ‘needless delay and technical disposition of a meritorious action.’ ” *Wilson* § 17-8, at 349 (quoting N.C.G.S. § 1A-1, Rule 17 comment). Pursuant to Rule 17, the trial court should have either corrected the plaintiff’s error itself or refused to hear the motion for summary judgment until the real party in interest was substituted for plaintiff. I would reverse and remand to give the real party in interest an opportunity to join or be substituted as a party plaintiff.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 JULY 1996

GUNTER v. KIRKLAND No. 95-613	Swain (92CVS89)	Reversed and Remanded
IN RE McMILLIANS No. 95-709	Hoke (92J41) (92J42) (92J43) (92J44)	Affirmed
LEAHY v. N.C. BD. OF NURSING No. 95-741	Wake (92CVS11815)	Reversed
LINKER v. HARRELSON FORD No. 95-1101	Mecklenburg (92CVS3280)	Affirmed
N.C. FARM BUREAU MUT. INS. CO. v. FLOYD No. 95-1032	Wake (95CVS348)	Affirmed
OLIVER v. LANE CO. No. 96-37	Ind. Comm. (369957)	Appeal Dismissed
PHIPPS v. TOWN OF TURKEY No. 95-934	Sampson (94CVS129)	Affirmed
REID v. N.C. MOBILE HOME CORP. No. 95-833	Ind. Comm. (249959)	Affirmed
RIVERA v. CAR COMPANY INTERNATIONAL No. 95-1089	Cumberland (92CVS669)	Affirmed
RUSSOS v. WHEATON INDUSTRIES No. 95-1345	Ind. Comm. (009428)	Vacated and Remanded
STATE v. BANNER No. 95-789	Mecklenburg (94CRS71947) (95CRS641)	No Error
STATE v. BOXLEY No. 96-112	Forsyth (95-CRS-29303)	No Error
STATE v. BREWER No. 95-997	Chatham (92CRS872) (92CRS873) (92CRS874)	Affirmed
STATE v. COSTON No. 95-1006	Perquimans (95CRS951)	No Error

STATE v. DILL No. 95-1210	Rutherford (94CRS8461)	No Error
STATE v. EVANS No. 96-118	Halifax (94CRS5205) (94CRS5206) (94CRS5207)	No Error
STATE v. GODFREY No. 96-82	Gaston (94CRS2281) (94CRS2284) (94CRS2286) (94CRS2289) (94CRS2290) (94CRS19571)	No Error
STATE v. HEMINGWAY No. 96-67	Cumberland (94CRS55920)	No Error
STATE v. JEFFERIES No. 95-1407	Sampson (94CRS1747) (94CRS1748) (94CRS1749) (94CRS1750)	No Error
STATE v. JOHNSON No. 96-227	Gaston (95CRS22641) (95CRS22643) (95CRS22644)	No Error
STATE v. JONES No. 95-1361	Orange (91CRS2999) (91CRS4000)	No Error
STATE v. KIRK No. 95-1446	Watauga (95CRS819)	No Error
STATE v. MALLARD No. 95-729	Pitt (93CRS24761)	No Error
STATE v. PENN No. 96-121	Surry (94CRS4921)	No Error
STATE v. PETTY No. 95-975	Guilford (94CRS45769) (94CRS20579)	No Error
STATE v. POWERS No. 95-796	Orange (94CRS7065)	Affirmed
STATE v. QUICK No. 95-1343	Anson (94CRS1382) (94CRS1383)	No Error
STATE v. REECE No. 95-815	Buncombe (94CRS57278) (94CRS57279)	No Error

STATE v. SHEPARD No. 95-800	Guilford (94CRS68485) (94CRS68486)	No Error
STATE v. WILSON No. 96-14	Edgecombe (94CRS4406) (95CRS6750)	No Error

FILED 6 AUGUST 1996

AIKEN v. N.C. DEPT. OF CORRECTION No. 94-1256	Pitt (92CVS2336)	Reversed
BOOKER v. METROPOLITAN SEWERAGE DIST. No. 95-1171	Ind. Comm. (301554)	Affirmed
BOYLES v. SAFRIT No. 96-39	Forsyth (87CVD570)	Affirmed
BRENNER v. MAIER No. 95-935	Watauga (94CVS220)	Reversed and Remanded
CAMPBELL v. CITY OF WINSTON-SALEM No. 95-545	Forsyth (94CVS8053)	Order Reversed in Part and Remanded; Appeal Dismissed in Part
CAMPBELL v. EATMAN'S, INC. No. 94-1332	Buncombe (93CVS1985)	Affirmed
CANADY v. HAYES No. 95-1187	Pender (91CVD434)	New trial as to defendant Ronnie Hayes
COLVILL v. BALDELLI No. 96-277	Stokes (94CVS37)	Dismissed
DEPT. OF TRANS. v. ISOM No. 95-1073	Mecklenburg (94CVS8116)	Dismissed
FRIZSELL v. SMITH DRAYLINE & STORAGE No. 95-131	Ind. Comm. (032311)	Affirmed
HATLEY v. K-MART CORP. No. 95-96	Mecklenburg (90CVS18184)	Affirmed
HOUSING AUTHORITY OF CITY OF RALEIGH v. ALLEN No. 95-1057	Wake (95CVD3329)	Affirmed

IN RE DENNIS No. 96-187	Randolph (95CRS63) (95CRS4432)	Case No. 95CRS63— Judgment and Commitment Vacated. Case No. 95CRS4432— Order Arresting Judgment Vacated; No Error in Trial; Remanded for Resentencing.
KATE v. KATE No. 95-1371	Catawba (92CVD701) (92CVD2070)	Affirmed
KING v. CITY OF CHARLOTTE No. 95-1160	Mecklenburg (92CVS12592)	Reversed and Remanded
LEE v. MILLS MFG. CORP. No. 95-1110	Ind. Comm. (160793) (360060)	Affirmed
LITTLE v. LITTLE No. 95-685	Mecklenburg (93CVD3723)	Affirmed in Part; Vacated and Remanded in Part
MARTIN v. FERREE No. 96-122	Wilkes (94CVS532)	Appeal Dismissed
McNEIL v. BD. OF ADJUST. OF TOWN OF LAKE LURE No. 95-783	Rutherford (94CVS1197)	Affirmed
MUSE v. BRITT No. 95-683	Buncombe (94CVS2234)	Affirmed
RHONEY v. KISER No. 95-1177	Lincoln (94CVS270)	Reversed and Remanded
SMITH v. FMC CORP. No. 95-1175	Ind. Comm. (050571)	Appeal Dismissed
STATE v. ADAMS No. 95-817	Wake (94CRS63407) (94CRS63408)	Affirmed
STATE v. ALEXANDER No. 96-250	Mecklenburg (95CRS34575)	No Error
STATE v. ALLEN No. 95-1384	Buncombe (95CRS51399)	No Error

STATE v. ALLEN No. 96-160	Rowan (94CRS13970) (94CRS13971)	No Error
STATE v. ARNOLD No. 95-1435	Mecklenburg (94CRS75024) (95CRS8690)	No Error
STATE v. ARTIS and OWENS No. 95-388	Mecklenburg (94CRS644) (94CRS1563)	No Error
STATE v. BERRY No. 96-258	Lenoir (95CRS7155) (95CRS4026)	No Error
STATE v. BLACK No. 96-108	Mecklenburg (94CRS59367)	No Error
STATE v. DAVIS No. 96-141	Guilford (92CRS54335)	No Error
STATE v. DURAN No. 96-65	Mecklenburg (90CRS94049) (90CRS94050) (90CRS94051) (90CRS94055) (90CRS3664)	Affirmed
STATE v. EDMONDS No. 96-142	Edgecombe (95CRS10430)	No Error
STATE v. EVANS No. 95-1281	Wilson (94CRS4178)	No Error
STATE v. EVERHART No. 96-84	Iredell (93CRS10175)	No Error
STATE v. GRAVES No. 95-836	Mecklenburg (93CRS31633) (93CRS31634) (93CRS62363)	No Error
STATE v. HALL No. 96-63	Wayne (91CRS2281)	No Error
STATE v. HERMES No. 95-1222	Brunswick (93CRS2727)	No Error
STATE v. HUNTER No. 95-872	Jones (94CRS2409)	No Error
STATE v. LAMBERT No. 95-1230	Durham (93CRS26663) (93CRS26665) (93CRS26666) (93CRS26667)	No Error

STATE v. LANGLEY No. 95-1415	Pitt (94CRS21372) (94CRS21373)	No Error
STATE v. MARTIN No. 96-114	Edgecombe (95CRS10011)	No Error
STATE v. McCOTTER No. 96-278	Wake (95CRS15647) (95CRS15648) (95CRS15649) (95CRS15650) (95CRS15651)	No Error
STATE v. McDOWELL No. 96-339	Mecklenburg (95CRS35988)	No Error
STATE v. MORGAN No. 96-186	Halifax (92CRS1291) (92CRS1292)	No Error
STATE v. PARKER No. 96-209	Wilson (94CRS6152) (94CRS6153)	No Error
STATE v. PEARSON No. 96-254	Cherokee (95CRS669) (94CRS670) (95CRS672) (95CRS676) (95CRS677) (95CRS678) (95CRS679) (95CRS683) (95CRS686)	Appeal Dismissed
STATE v. RANSOM No. 95-1365	Onslow (90CRS21916)	Dismissed
STATE v. RANSOME No. 95-1260	Northampton (95CRS1283)	No Error
STATE v. ROGERS No. 96-159	Guilford (95CRS42329)	No Error
STATE v. ROGERS No. 96-309	Rowan (95CRS2811) (95CRS5032)	Vacated
STATE v. SEWELL No. 96-96	Randolph (93CRS5241) (93CRS5242) (93CRS5245) (93CRS5246) (93CRS5247)	No Error

STATE v. SHANLEY No. 95-1218	Moore (94CRS5677)	No Prejudicial Error
STATE v. SNEAD No. 95-1238	Rockingham (94CRS8729)	Reversed
STATE v. TALFORD No. 95-1294	Mecklenburg (94CRS9075)	No Error
STATE v. TEMPLETON No. 95-1268	Watauga (94CRS4847)	Appeal Dismissed
STATE v. TYSON No. 95-1179	Davidson (94CRS3173)	Appeal Dismissed
STATE v. WILLIAMS No. 96-133	Sampson (95CRS2369)	No Error
STATE v. WRIGHT No. 95-1385	Mecklenburg (94CRS42096)	No Error
TELLEKAMP v. GUILFORD COUNTY No. 96-111	Guilford (94CVS4332)	Dismissed
THRASHER v. FEITH No. 95-1314	Wilson (94CVD224)	Affirmed
U.S. FIDELITY & GUAR. CO. v. JDL ENTERPRISES No. 96-184	Guilford (94CVS7008)	No Error
WILLIFORD v. ATLANTIC AMERICAN PROPERTIES No. 95-1443	Cabarrus (94CVD1331)	Dismissed
WOODS v. HIDDEN VALLEY TRANS. No. 95-410	Ind. Comm. (150389)	Affirmed in Part and Reversed in Part

STATE v. SISK

[123 N.C. App. 361 (1996)]

STATE OF NORTH CAROLINA v. AMY JANE SISK, DEFENDANT

No. COA95-866

(Filed 6 August 1996)

1. Forgery § 19 (NCI4th)— no fatal variance between indictment and proof—indictment altered but not amended

Though the indictment charging the uttering of a forged check with intent to defraud was carelessly drafted, the variance between the indictment and the proof at trial was not fatal where the caption of the indictment correctly stated defendant's name as the person charged, and the indictment incorporated that identification by reference in the body of the indictment; the body of the indictment specifically identified defendant as the named payee of the forged document before mistakenly referring to defendant by the incorrect name; the use of the incorrect bank name did not confuse the charge against defendant; and alterations allowed by the trial court to make the indictment conform to the evidence did not alter the charge substantially and thus did not constitute an impermissible amendment.

Am Jur 2d, Forgery § 41.

Sufficiency of the indictment information, or other form of criminal complaint, omitting or misstating middle name or initial of person named therein. 15 ALR3d 968.

2. Criminal Law § 113 (NCI4th)— failure to comply with discovery—sanctions not imposed—no abuse of discretion

The trial court did not abuse its discretion in permitting the State to elicit testimony with regard to allegedly forged checks which the State had failed to produce prior to trial pursuant to defendant's discovery request. N.C.G.S. § 15A-910.

Am Jur 2d, Depositions and Discovery § 426.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like—modern cases. 27 ALR4th 105.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses—modern cases. 33 ALR4th 301.

STATE v. SISK

[123 N.C. App. 361 (1996)]

3. Evidence and Witnesses § 2647 (NCI4th)— psychiatric records of witness—refusal to require disclosure

The trial court did not err by refusing to require disclosure to defendant of the psychiatric records of a State's witness and to permit defendant to cross-examine the witness with information provided by those records where the trial court reviewed the records *in camera* and found that the information therein was only remotely material to the credibility of the witness. N.C.G.S. § 8-53.

Am Jur 2d, Witnesses §§ 487, 488.

Physician-patient privilege as extending to patient's medical or hospital records. 10 ALR4th 552.

4. Evidence and Witnesses § 330 (NCI4th)— uttering forged checks—other checks admissible to show knowledge

In a prosecution for uttering a forged check, other allegedly forged checks drawn on the victim's account but which were not referenced in the indictment were admissible to show knowledge by defendant. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Forgery § 48.

Admissibility, in forgery prosecution, of other acts of forgery. 34 ALR2d 777.

5. Evidence and Witnesses § 967 (NCI4th)— affidavit admitted under business records exception—harmless error

Though the trial court erred by admitting under the business records exception to the hearsay rule the affidavit of a bank account owner that several checks were neither signed nor otherwise authorized by him, such error was not prejudicial to defendant, since defendant's defense was not that the bank account owner had in fact signed or authorized the checks, but rather that defendant believed the owner had and she cashed the checks with the good faith belief that they were loans, and the objectionable affidavit did not speak to the issue of whether defendant believed the owner had authorized the checks. N.C.G.S. § 8C-1, Rule 803(6).

Am Jur 2d, Appellate Review §§ 713, 752, 753.

6. Forgery § 28 (NCI4th)— uttering forged check—sufficiency of evidence

The evidence was sufficient for the jury in a prosecution for uttering a forged check with the intent to defraud where defend-

STATE v. SISK

[123 N.C. App. 361 (1996)]

ant's boyfriend testified that defendant signed the account owner's name on the check, and defendant testified that she cashed the check.

Am Jur 2d, Forgery §§ 16, 44.

7. Criminal Law § 547 (NCI4th)— closing argument—reference to unadmitted evidence—mistrial not required

The trial court did not err in failing to declare a mistrial in a prosecution for uttering a forged check when the prosecutor, during closing arguments, mentioned two checks that were not admitted into evidence where the record shows no substantial and irreparable prejudice to defendant's case.

Am Jur 2d, Appellate Review §§ 752, 753.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present. 90 ALR3d 646.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 24 March 1995 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 16 April 1996.

Attorney General Michael F. Easley, by Assistant Attorney General J. Philip Allen, for the State.

Paul M. James, III for defendant-appellant.

JOHNSON, Judge.

In February 1994, Wachovia Bank employees noticed that an account belonging to Robert Arey had twenty-seven (27) checks totaling forty-three thousand dollars (\$43,000) drawn against it over a seven week period. Since this account generally showed little activity, Wachovia began an investigation to determine whether any illegal activity was taking place.

Jeffrey Fleshman, then an investigator working for Wachovia, started the investigation by contacting Detective Tony Emerson of the Winston-Salem Police Department. Together they interviewed Mr. Arey at Baptist Hospital, where he was a patient. During the course of their interview, the investigators showed Mr. Arey several checks

STATE v. SISK

[123 N.C. App. 361 (1996)]

drawn against his account during February of 1994. Mr. Arey told them that he had neither signed the checks drawn against his account nor given anyone permission to sign his name. Mr. Arey signed several affidavits indicating that checks drawn against his account in February of 1994 were forged. Some of the forged checks were made out to defendant Amy Jane Sisk, and others were made out to Joseph Delaney, who dated defendant during the time that the checks were forged.

The State indicted defendant on the charge of uttering a forged check with the intent to defraud. At trial, Delaney testified for the State that he and defendant decided to forge checks from Mr. Arey's account, and practiced his signature in order to perpetrate the forgeries. Further, Delaney testified that he and defendant used a typewriter at a public library to make out the checks, some to himself and some to defendant, for various amounts, and that defendant forged Mr. Arey's signature on the checks. They later cashed the checks and split the proceeds. Moreover, Delaney testified that the night before they were to be interviewed by police about the checks, he and defendant went over the story they would give—that the checks had been given to them by Larry Cook, who kept Mr. Arey's checkbook, as loans from Mr. Arey to assist in their marriage and to set up a household.

Larry Cook testified that Delaney and defendant came by one day and that he and Delaney went out to buy beer while defendant stayed upstairs in the apartment. When Cook and Delaney returned, Delaney and defendant quickly left. Upon finding several checks missing from Mr. Arey's checkbook, Cook allegedly called the police, who responded that they could not do anything because he could not identify the numbers of the missing checks. No police report corroborated Cook's testimony that he had contacted the police. Cook also testified that he never gave defendant any checks.

Defendant, however, testified that Delaney gave her the check that she was accused of forging, and indicated that it was a loan from Mr. Arey because he liked to help young couples get started and that Cook could arrange for them to borrow money from Mr. Arey. Further, defendant testified that she and Delaney visited Cook often and that Cook personally gave her the other checks drawn on Mr. Arey's account. Defendant also testified that she knew nothing of Delaney's involvement in forging checks from Mr. Arey's account until after the money was spent.

STATE v. SISK

[123 N.C. App. 361 (1996)]

The State offered into evidence seven checks, ranging in amounts from \$1500 to \$2875, drawn on Mr. Arey's account—four were made out to Delaney and three to defendant, totaling \$15,350. The State also offered Mr. Arey's affidavits stating that his signatures on the seven checks were forgeries.

Defendant was convicted of uttering a forged instrument. Judge Judson DeRamus, Jr. sentenced defendant to two years in prison, but suspended her sentence, and ordered probation for the period of five years. Defendant appeals.

[1] Defendant first argues that the trial court erred in denying her motion to dismiss the charge at the close of the State's evidence as there was a fatal variance between the indictment and the proof. We disagree.

Defendant contends that the State's proof was at fatal variance with the indictment in the following areas: (1) the State failed to prove that defendant was the same person named in the body of the indictment, "Janette Marsh Cook," and (2) the indictment alleged that the person defrauded or intended to be defrauded was First Union National Bank, whereas the proof offered at trial showed that it was Wachovia Bank. Defendant alleges that these variances were fatal as the State offered proof at trial which did not conform to the material allegations in the indictment.

While we recognize that the indictment was carelessly drafted, we do not believe that the variance between the indictment and the proof at trial is fatal. In fact, the trial court allowed the indictment to be amended to conform to the evidence presented at trial. The caption of the indictment correctly stated defendant's name as the person charged, and the indictment incorporated that identification by reference in the body of the indictment. Moreover, the body of the indictment specifically identified defendant as the named payee of the forged document before mistakenly referring to defendant as Janette Marsh Cook. *See State v. Johnson*, 77 N.C. App. 583, 335 S.E.2d 770 (1985) (holding that naming defendant in caption of indictment, and then referencing caption in body of indictment, is sufficient identification of defendant).

Furthermore, defendant failed to show that the use of the name Janette Marsh Cook prejudiced her during the trial or during her trial preparation. The record shows that defendant was represented by

STATE v. SISK

[123 N.C. App. 361 (1996)]

counsel shortly after the arrest warrant was issued, and that her counsel had at least eight months to prepare for trial. Thus, defendant was amply aware that the indictment charged her, and not Janette Marsh Cook, with the crime stated.

Additionally, we do not find the use of the incorrect bank name to be a fatal error. In *State v. Cameron*, the evidence presented at trial tended to show that the crime alleged in the indictment occurred a week prior to the date specified in the indictment. 83 N.C. App. 69, 349 S.E.2d 327 (1986). This Court allowed the State to alter the indictment to conform to the evidence, stating: "What is important is the defendant's understanding of the charge against which he needed to defend." *Id.* at 73, 349 S.E.2d at 330. In the case *sub judice*, the name of the bank does not confuse the charge against defendant.

Moreover, the name of the bank does not speak to the essential elements of the offense charged, and thus it "should be disregarded." *State v. Lewis*, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982), *cert. denied*, 311 N.C. 766, 321 S.E.2d 152 (1984). A mistake in such information which is mere surplusage may be ignored if its inclusion has not prejudiced defendant. *See State v. Cole*, 19 N.C. App. 611, 199 S.E.2d 748 (1973). Defendant did not rely on the identity of the bank in framing her defense. Defendant's argument at trial was that she believed the checks were legally signed. The bank at which she cashed the check is irrelevant to this defense. Thus, the indictment did not contain a fatal variance, nor did the trial court improperly allow the indictment to be altered. *See Cameron*, 83 N.C. App. at 73, 349 S.E.2d at 330 (holding that incorrect date of alleged offense in indictment was not fatal error because defendant did not rely on a "reverse alibi" defense).

This Court recognizes that an indictment may not be "amended" pursuant to North Carolina General Statutes § 15A-923(e); however, this Court also recognizes that "[t]his statute . . . has been construed to mean only that an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.'" *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. rev. denied and dismissal allowed*, 294 N.C. 737, 244 S.E.2d 155 (1978)). We hold that the alterations allowed by the trial court did not alter the charge substantially for the purposes of this definition, and thus, the alterations do not constitute an amendment. These arguments are, consequently, without merit.

STATE v. SISK

[123 N.C. App. 361 (1996)]

[2] Defendant next argues that the trial court erred in allowing the State to elicit testimony with regard to exhibits 19-21 (the checks) because the State did not produce the exhibits prior to trial pursuant to defendant's discovery request. Noncompliance with discovery requests in criminal cases are governed by North Carolina General Statutes section 15A-910. This statute authorizes various sanctions for noncompliance; however, the decision of whether to impose sanctions is within the sound discretion of the trial court and is not reviewable on appeal absent an abuse of discretion. *See State v. Herring*, 322 N.C. 733, 370 S.E.2d 363 (1988); *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Upon a careful review of the record, we find no abuse of discretion; therefore, this argument fails.

Defendant also argues that the trial court erred in refusing to allow defense counsel to adequately cross-examine State witness Joe Delaney with regard to his violations of probation. Defendant contends that asking the witness about possible probation violations could have shown bias by the witness. However, it is well-established that the scope of cross-examination is within the trial court's sound discretion. *State v. Wrenn*, 316 N.C. 141, 340 S.E.2d 443 (1986). Furthermore, defendant has failed to show that she was prejudiced by the trial court's ruling. *See State v. Howie*, 310 N.C. 613, 313 S.E.2d 554 (1984). As the record reveals that defense counsel questioned the witness exhaustively about his criminal record and prior probation violations, this argument is without merit.

[3] Defendant next argues that the trial court erred in refusing to allow defense counsel to review witness Delaney's psychiatric records and to cross-examine the witness with the information provided from those records. Confidential medical records of witnesses may be disclosed if the trial court makes a determination that disclosure is necessary for a proper administration of justice. N.C. Gen. Stat. § 8-53 (1986). However, the trial court is granted broad discretion in determining what is necessary for proper administration of justice. *State v. Efird*, 309 N.C. 802, 309 S.E.2d 228 (1983). In this action, the trial court reviewed the records *in camera* and found "nothing of anything but remote materiality to any credibility—possible credibility issues of Mr. Delaney. Just some general things about stress—financial stress and anger, such as that but nothing in any detail to indicate any lack of credibility or credibility." Thus, there is nothing to show that the trial court abused its discretion. As such, this argument is without merit.

STATE v. SISK

[123 N.C. App. 361 (1996)]

[4] Defendant also argues that the trial court erred in introducing as evidence checks, pursuant to Rule 404(b), other than the check referenced in the indictment. We disagree. Rule 404(b) of the North Carolina Rules of Evidence allows admission of evidence to show knowledge. Further, it is within the trial court's discretion whether the probative value of admitting the other checks outweighed any danger of unfair prejudice. *See State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). As no abuse of discretion has been shown, this argument fails.

[5] Defendant next argues that the trial court erred by admitting the affidavits of Mr. Arey under the business record exception to the hearsay rule because the affidavits were part of the records of the investigators, and such error was prejudicial to defendant. However, after reviewing the evidence, we find no prejudicial error, and affirm the trial court's judgment.

Hearsay is defined as a statement "offer[ed] into evidence[,] . . . [whether] oral or written, made by a person other than the witness for the purpose of establishing the truth of the matter so stated." *State v. Wood*, 306 N.C. 510, 514, 294 S.E.2d 310, 312 (1982); N.C. Gen. Stat. § 8C-1, Rule 801 (1992). Hearsay is generally inadmissible, unless an exception to the hearsay rule is applicable. N.C. Gen. Stat. § 8C-1, Rule 802 (1992); *see State v. Rogers*, 109 N.C. App. 491, 428 S.E.2d 220, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, — U.S. —, 128 L. Ed. 2d 54 (1994) (holding that in order to admit hearsay evidence, the State must show that the introduction of the evidence is necessary, that the statement is sufficiently reliable and trustworthy, and that the statement fits within a firmly rooted exception to the hearsay rule).

North Carolina General Statutes section 8C-1, Rule 803(6), commonly known as the business records exception, states that the following is not excluded by the hearsay rule:

(6) Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances

STATE v. SISK

[123 N.C. App. 361 (1996)]

of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (1992). As a result of this exception, business records are admissible if "made in the regular course of business, at or near the time of the transaction involved, and . . . authenticated by a witness who is familiar with them and the system under which they were made" *State v. Galloway*, 304 N.C. 485, 492, 284 S.E.2d 509, 514 (1981).

Statements made by a person other than the person(s) compiling the business record which are recorded within the record are double hearsay, or compound hearsay, and may only be admitted if an exception to the hearsay rule is found for that statement. *Fisher v. Thompson*, 50 N.C. App. 724, 727-28, 275 S.E.2d 507, 511 (1981).

In the instant case, the trial court admitted, over defendant's objection, several affidavits from Mr. Arey indicating that certain of the checks which cleared his account during the time in question, February and March of 1994, were neither signed nor otherwise authorized by him. With regard to the check defendant was convicted of forging, the affidavit was admitted as substantive evidence. With regard to the other checks, the affidavits were admitted under Rule 404(b) as evidence of a common plan or scheme.

Assuming *arguendo*, that the several affidavits, taken together, were properly admitted as business records because they were recorded by Mr. Fleshman and Mr. Emerson during the course of business, there still must be a separate hearsay exception for the statements by Mr. Arey, which comprised much of the affidavits, as these statements are double hearsay. *Fisher*, 50 N.C. App. at 727-28, 275 S.E.2d at 511. The State has not presented such an exception, nor do we believe that an exception exists under these facts which would allow the statements by Mr. Arey to be admitted as substantive evidence. Accordingly, we find error in the admission of the affidavit of Mr. Arey as substantive evidence of the alleged forgery of a check by defendant. Having determined that the admission of Mr. Arey's affidavit as substantive evidence was erroneous, we must next determine whether the error was prejudicial, thus requiring a new trial.

It is well-settled that erroneous admission of hearsay evidence does not always require a new trial. *State v. Ramey*, 318 N.C. 457, 470,

STATE v. SISK

[123 N.C. App. 361 (1996)]

349 S.E.2d 566, 574 (1986). North Carolina General Statutes section 15A-1443 states “[a] violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. . . .” N.C. Gen. Stat. § 15A-1443 (1988). The substantive admission of hearsay evidence not falling within a statutory exception to the hearsay rule is prohibited by the Confrontation Clause of the Sixth Amendment to the United States Constitution. *See Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980); *Rogers*, 109 N.C. App. 491, 428 S.E.2d 220; *In re Lucas*, 94 N.C. App. 442, 380 S.E.2d 563 (1989). Thus, the burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless. N.C.G.S. § 15A-1443. In order for this Court to find that the error affecting defendant’s constitutional rights was harmless beyond a reasonable doubt, we must determine that the error had no bearing on the jury deliberations. *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993); *State v. Thompson*, 118 N.C. App. 33, 42, 454 S.E.2d 271, 277, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995).

The State points out in its brief that defendant’s defense was not that Mr. Arey had in fact signed or authorized the checks, but rather that defendant believed Mr. Arey had, and that she cashed the checks with the good faith belief that they were loans. We find that the admission of Mr. Arey’s affidavit was harmless because it did not speak to the issue of whether defendant believed Mr. Arey had authorized the checks.

In addition, defendant’s boyfriend, Joe Delaney, who pled guilty to four counts of uttering a forged check, and Larry Cook, who pled guilty to obtaining money from Mr. Arey by false pretenses, both testified against defendant. Their testimony, if believed, was ample evidence from which a jury could have found defendant guilty of the charged offense. Accordingly, there was no prejudicial error.

[6] Defendant next argues that the trial court erred in denying its motion to dismiss at the close of all of the evidence as there was insufficient evidence. We disagree.

Substantial evidence that a crime has been committed and that defendant was the perpetrator of that crime must exist to withstand a motion to dismiss. *State v. Rannels*, 333 N.C. 644, 430 S.E.2d 254 (1993). The evidence viewed in the light most favorable to the State reveals that witness Joe Delaney testified that defendant signed Mr. Arey’s name on the check, and defendant testified that she cashed the

STATE v. SISK

[123 N.C. App. 361 (1996)]

check. This evidence, even without the Rule 404(b) evidence, was substantial evidence to show that defendant (1) offered a forged check to another, (2) with knowledge that the check was false, and (3) with the intent to defraud. *See* N.C. Gen. Stat. § 14-120 (1993). Thus, defendant's argument is without merit.

[7] Defendant next argues that the trial court erred in failing to declare a mistrial when the prosecutor, during closing arguments, mentioned two checks that were not admitted into evidence during the trial. A review of the record reveals that no "substantial and irreparable prejudice" was done to defendant's case. *See* N.C. Gen. Stat. § 15A-1061 (1988).

A motion for mistrial should be granted when an occurrence during the trial results "in substantial and irreparable prejudice to the defendant's case." The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal.

State v. Mills, 39 N.C. App. 47, 50, 249 S.E.2d 446, 448 (1978), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 33 (1979) (citation omitted). No abuse of discretion was shown, thus, this argument is also without merit.

Defendant's final argument is that the trial court abused its discretion by allowing the Wachovia investigator to describe the facts that led to his investigation. After a careful review of this matter, we find no abuse of discretion.

For the reasons stated herein, we find that defendant received a fair trial, free from prejudicial error.

No error.

Judge WALKER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I disagree with the conclusion of the majority that the admission of the affidavit of Mr. Arey was harmless. Accordingly, I dissent.

STATE v. SISK

[123 N.C. App. 361 (1996)]

As stated by the majority, “[a] violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.” N.C. Gen. Stat. § 15A-1443(b) (1991). In order for this Court to find that the error affecting the defendant’s constitutional rights was harmless, we must determine that the error had no bearing on the jury deliberations. *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993); *State v. Thompson*, 118 N.C. App. 33, 42, 454 S.E.2d 271, 277.

I don’t believe the introduction of Mr. Arey’s affidavits had “no bearing on the jury deliberations.” Ms. Sisk was charged with the crime of uttering a forged check with the intent to defraud. One essential element of this crime is that the instrument is in fact forged. Mr. Arey stated in his affidavit that he had not signed the check which Ms. Sisk was accused of forging, meaning that it was forged by someone.

The majority concludes that since Ms. Sisk’s defense was not that Mr. Arey had authorized the checks, but rather that she believed he had, Mr. Arey’s affidavit was not necessary to prove her guilt. Whether erroneously admitted evidence is necessary to prove guilt is not the test for overcoming an error affecting a constitutional right. Rather, we must determine that the evidence had no bearing on the jury’s deliberation. *Reid*, 334 N.C. 551, 434 S.E.2d 193.

In addition, the majority states that both Joe Delaney and Larry Cook testified against Ms. Sisk. However, a review of the transcript reveals that Mr. Cook’s testimony was of a limited nature, and conflicted in important ways with the testimony of Mr. Delaney. This fact further demonstrates why we can not determine that the introduction of Mr. Arey’s affidavit had no bearing on the jury’s deliberations.

Since I conclude that the State failed to meet its burden of showing that the introduction of Mr. Arey’s affidavit in violation of Ms. Sisk’s constitutional rights had no bearing on the jury’s deliberations, I must respectfully dissent.

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

JOSEPH H. BARRINGER, PETITIONER/APPELLANT, v. CALDWELL COUNTY BOARD OF
EDUCATION, RESPONDENT/APPELLEE

No. COA94-962

(Filed 6 August 1996)

1. Schools § 154 (NCI4th)—immorality of teacher—standard related to teacher's fitness for service—constitutionality of statute

N.C.G.S. § 115C-325(e)(1)b implicitly requires the "immorality" of a career teacher to be in relation to, or to affect, that teacher's work, before the teacher may be dismissed or demoted upon such ground; thus, just as "inadequate performance" reflects a standard of skill expected in the performance of a teaching job, "immorality" in the context of teacher dismissal signifies a standard directly related to the teacher's fitness for service, and the statute therefore is not unconstitutionally vague.

Am Jur 2d, Constitutional Law § 818.

Indefiniteness of language affecting validity of criminal legislation or judicial definition of common-law crime. 16 L. Ed. 2d 1231.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L. Ed. 2d 823.

Supreme Court's views on weight to be accorded to pronouncements of legislature, or members of legislature, respecting meaning or intent of previously enacted statute. 56 L. Ed. 2d 918.

2. Schools § 154 (NCI4th)—teacher dismissed after immoral conduct—statute constitutional as applied to plaintiff

N.C.G.S. § 115C-325(e)(1)b was constitutional as applied to plaintiff in this case when the teacher was dismissed after pleading guilty to first-degree trespass, since a reasonable public school teacher of "ordinary intelligence" and utilizing "common understanding" would know that approaching a crowded pool room located in the general community where one serves as a teacher in the early morning hours and armed with a fully loaded shotgun and a sidearm, and subsequently proffering an explanation indicative of a violent intent, constituted conduct likely to become known to the general student population at the school

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

where the teacher was employed, and would reflect to the teacher's young charges a poor example manifesting approval of violence and taking the law into one's own hands, consequently placing the teacher's professional position in jeopardy.

Am Jur 2d, Public Officers and Employees § 244; Schools § 156.

Indefiniteness of language affecting validity of criminal legislation or judicial definition of common-law crime. 16 L. Ed. 2d 1231.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L. Ed. 2d 823.

Appeal by petitioner from order entered 14 March 1994 by Judge Robert Burroughs in Caldwell County Superior Court. Heard in the Court of Appeals 10 May 1995.

Carpenter, Bost & Cartee by John F. Bost, III, and John G. McCormick, P.A., by John G. McCormick, for petitioner-appellant.

Cannon & Blair, P.A. by Edward H. Blair, Jr., and Bennett & Blancato, by William A. Blancato, for respondent-appellee.

Tharrington, Smith & Hargrove by Ann L. Majestic and Rod Malone, for North Carolina School Boards Association, Inc., Amicus Curiae Brief.

Attorney General Michael F. Easley, by Assistant Attorney General Barbara A. Shaw, for the state.

JOHN, Judge.

Petitioner Joseph H. Barringer contends the trial court erred by affirming his dismissal as a career teacher by respondent Caldwell County Board of Education (the Board). We disagree.

Petitioner, prior to the events giving rise to his dismissal, was a mathematics teacher at West Caldwell High School (West Caldwell) with 15 years experience and career tenure status under the provisions of N.C.G.S. § 115C-325. The Board represents the duly-constituted public body charged by law with operation of the Caldwell County Public School System. *See* N.C.G.S. § 115C-1, *et. seq.*

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

Pertinent factual and procedural background is as follows: At approximately 12:28 a.m. on 20 March 1993, petitioner began approaching the entrance of Pat's Pool Room (the pool room), located in Hickory, N.C., armed with a 12-gauge, short barrel, pump shotgun, fully loaded with one shell in the chamber. Three shells, known as "fleschette" or anti-personnel shells, contained small metal arrows as opposed to pellets. In his waistband, petitioner also carried a loaded .38 caliber pistol partially covered by his jacket.

Two Hickory Police Department officers were among the 60-100 persons present within the pool room premises. The officers observed a number of patrons suddenly vacate the front door area screaming that someone was outside armed with a gun. Opening the front door, the two observed petitioner facing the entrance approximately three or four feet away, holding the shotgun so that the barrel was pointing in the general direction of the door. The officers ordered petitioner to put the gun down; after several requests, he ultimately complied. He then placed his hands above his head, and was approached by the two police officers who removed the handgun from his waistband.

When asked what he was doing at that location, petitioner replied he was "looking for a friend." Upon an officer's further inquiry, "[W]hy, to show him the gun?", petitioner responded "no, to show him the bullets."

Petitioner was then arrested and charged with going armed to the terror of the public and carrying a concealed weapon. He subsequently pled guilty to first degree trespass and received a six months sentence, suspended upon three years supervised probation. The incident was publicized in area newspapers, radio stations, and spread by word-of-mouth among students, parents, faculty, and staff at West Caldwell. Petitioner later requested and was granted a leave of absence by Ken Roberts, Superintendent of Caldwell County Schools (the Superintendent).

On 10 August 1993, the Superintendent initiated suspension and dismissal procedures against petitioner. Pursuant to G.S. § 115C-325(h) and (i), a Professional Review Committee hearing was held 28 September 1993. Testimony was presented by the police officers present at the pool room when petitioner was arrested, as well as by a West Caldwell parent, teachers, the principal, and a guidance counselor at West Caldwell. The latter group of witnesses acknowledged petitioner had been an excellent classroom teacher, but agreed

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

that serving as a role-model and teaching non-violent avenues of conflict-resolution constituted additional responsibilities for teachers at West Caldwell, a school which had experienced recent problems with violence and gun possession on campus. The Committee thereafter unanimously joined the Superintendent's recommendation that petitioner be dismissed.

The Board took up the matter 26 October 1993, reviewing the recommendation of the Superintendent, as well as the evidence presented to the Professional Review Committee and the Committee's report. Within its order issued the same date, the Board set out detailed findings of fact, concluded petitioner was subject to dismissal under either G.S. § 115C-325(e)(1)b ("immorality") or § 115C-325(e)(1)k ("any cause [constituting] grounds for revocation of [a] career teacher's license"), and ordered petitioner "dismissed as a career teacher from the Caldwell County Public School System."

Petitioner thereupon sought judicial review by the Caldwell County Superior Court pursuant to Chapter 150B of the North Carolina General Statutes. By order filed 14 March 1994, the trial court affirmed the Board's dismissal of petitioner. The latter's notice of appeal to this Court was filed 11 April 1994.

We note preliminarily that petitioner has categorized his "assignments of error" to the trial court's order as follows:

1. The Court's "Findings" Nos. 1 through 8.

....

2. The Court's "Order".

Our Appellate Rules expressly provide that an assignment of error "shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). Petitioner has in no way complied with the Rule, and is subject to sanctions including dismissal of his appeal. N.C.R. App. P. 25(b). We expressly disapprove of petitioner's formulation of his assignments of error and tax him with double the costs as computed by the Clerk.

Further, although petitioner has formulated and discussed three questions on appeal to this Court, only one was raised in his petition to the trial court as follows:

B.

(1) As to ground for dismissal G.S. § 115C-325(e)(1)b, the statute vesting in the School Board the power to dismiss teachers

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

for immorality without defining immorality is unconstitutionally vague because it fails to give fair warning of what conduct is prohibited and permits erratic and prejudiced exercises of authority; the statute is also unconstitutional by not requiring a nexus between conduct and teaching performance.

While our examination of this matter is restricted in the first instance to petitioner's assignments of error to the trial court's order, *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988), our review is

further limited by the issues raised in the petition for judicial review made to the superior court. Issues not raised in the petition for judicial review [to the trial court] cannot be asserted as a basis in *this* Court for reversing the [Board's] decision.

Air-A-Plane Corp. v. N.C. Dept. of E.H.N.R., 118 N.C. App. 118, 123, 454 S.E.2d 297, 300 (1995) (emphasis added). We therefore proceed to discuss the single argument preserved for our consideration in consequence of having been raised by petitioner both on appeal to this Court and in his petition for judicial review directed to the trial court.

[1] Petitioner asserts that G.S. § 115C-325(e)(1)b is unconstitutionally vague

because it fails to give fair warning of what conduct is prohibited, fails to require a nexus between conduct and teaching performance, and permits erratic and prejudiced exercises of authority.

The trial court determined, as do we, petitioner's argument to be unfounded.

The statute which is the focus of petitioner's contention contains the following language:

(e) Grounds for Dismissal or Demotion of a Career Teacher.

(1) No career teacher shall be dismissed or demoted or employed on a part-time basis except for one or more of the following:

....

b. Immorality

....

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

G.S. § 115C-325(e)(1)b. Petitioner's challenge to the constitutionality of this statute requires our *de novo* review of the trial court's determination. *See Overton v. Board of Education*, 304 N.C. 312, 316-317, 283 S.E.2d 495, 498 (1981) ("the standards for judicial review set forth in G.S. § 150A-51 [now N.C. Gen. Stat. § 150B-51] are applicable to appeals from school boards to the courts"); and *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 686, 468 S.E.2d 813, 816 (1996) (pursuant to G.S. § 150B-51, "[w]hen reviewing an agency decision for constitutional . . . errors, this Court applies *de novo* review").

At the outset, we observe petitioner carries a heavy burden in contesting the constitutionality of a state law. *Smith v. Wilkins*, 75 N.C. App. 483, 485, 331 S.E.2d 159, 161 (1985). A strong presumption exists in favor of constitutionality, and a statute will not be declared unconstitutional unless it is clearly so, *Tetterton v. Long Manufacturing Co., Inc.* 314 N.C. 44, 49, 332 S.E.2d 67, 70 (1985), or the statute cannot be upheld on any reasonable ground. *Ramsey v. Veterans Comm.*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). Moreover, "a mere doubt [as to constitutionality] does not afford sufficient reason for a judicial declaration of invalidity." *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 633 (1968).

In addition, petitioner's assertion notwithstanding, the United States Supreme Court has held that a civil statute overcomes a challenge on grounds of vagueness merely by conveying a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," and that "difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness." *Jordan v. De George*, 341 U.S. 223, 231-32, 95 L.Ed. 886, 892 (1951) (upholding constitutionality of statute establishing conviction of crime involving "moral turpitude" as grounds for deportation). Vagueness challenges such as that of petitioner not involving First Amendment interests are to be analyzed as applied to the facts of the case at issue, and "where reasonable persons would know that their conduct is at risk," the statute should be upheld. *Maynard v. Cartwright*, 486 U.S. 356, 361, 100 L.Ed.2d 372, 380 (1988).

Further, our North Carolina Supreme Court has stated that terminology such as "good moral character" denoting acceptable and unacceptable standards of behavior has been

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

so extensively used as a standard that its long usage and the case law surrounding that usage have given the term well-defined contours which make it a constitutionally appropriate standard.

In re Willis, 288 N.C. 1, 11, 215 S.E.2d 771, 777, *app. dismissed*, 423 U.S. 976, 46 L.Ed.2d 300 (1975) (rejecting argument that “good moral character” is a constitutionally inadequate standard by which Board of Law Examiners might determine fitness for admission to Bar).

Moreover, although our Courts have had no prior occasion to rule upon the constitutionality of “immorality” as a ground for teacher dismissal, this Court in such a context has twice upheld “inadequate performance,” *see* G.S. § 115C-325(e)(1)(a), as constitutional. *Crump v. Durham Co. Board of Education*, 74 N.C. App. 77, 80, 327 S.E.2d 599, 601 (1985); *Nestler v. Chapel Hill/Carrboro Bd. of Educ.*, 66 N.C. App. 232, 238, 311 S.E.2d 57, 60 (1984). We reasoned that the phraseology

‘inadequate performance’ *in regard to a job*, can be readily understood by any person of ordinary intelligence who knows what the job entails,

Crump, 74 N.C. App. at 80-1, 327 S.E.2d at 601 (emphasis added), and provides

an objective standard with which a person of ordinary understanding [can] determine how he must comply.

Nestler, 66 N.C. App. at 238, 311 S.E.2d at 60.

To serve as grounds for dismissal of a career teacher, therefore, “immorality” must be viewed in the context of or “in regard to a [teaching] job.” *Crump*, 74 N.C. App. at 80, 327 S.E.2d at 601. In other words, we find unpersuasive petitioner’s argument that the statute unconstitutionally fails to require a nexus between conduct and teaching performance. To the contrary, the statute implicitly requires the “immorality” of a career teacher to be in relation to, or to affect, that teacher’s work, before the teacher may be dismissed or demoted upon such ground. Thus, just as “inadequate performance” reflects a standard of skill expected in the performance of a teaching job, *see Crump at id.* and *Nestler at id.*, “immorality” in the context of teacher dismissal signifies a standard directly related to the teacher’s fitness for service. To hold otherwise would defeat the legislative purpose of maintaining career teachers within their positions, a purpose explicitly signified by the statutory prohibition against dismissal of a career teacher save in specific enumerated instances.

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

The majority of jurisdictions addressing the issue have reached a similar conclusion. For example, in *Weissman v. Board of Education of Jefferson County School District No. R—1*, 547 P.2d 1267 (Colo. 1976), a tenured teacher was dismissed on the statutory basis of “immorality.” He subsequently asserted the statute was unconstitutional as excessively vague and lacking a nexus between the prohibited conduct and the teacher’s classroom effectiveness. *Id.* at 1272.

The Colorado court first held the statute implicitly required such a nexus, observing the legislative intent was not

to potentially subject every teacher to discipline, even dismissal, for private peccadillos or personal shortcomings that might come to the attention of the board of education, but yet have little or no relation to the teacher’s relationship with his students, his fellow teachers, or with the school community.

Id. at 1272-73. Interpreting “immorality” only “insofar as [it] relate[s] to the teacher’s unfitness to teach,” the court then held the statute to be “sufficiently precise to meet minimal due process standards” and rejected petitioner’s challenge for vagueness. *Id.* at 1275. *See also Thompson v. Southwest Sch. Dist.*, 483 F. Supp. 1170 (W.D. Mo. 1980); *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Ca. 1969); and *Golden v. Bd. of Educ.*, 285 S.E.2d 665 (W.Va. 1981).

In *Hainline v. Bond*, 824 P.2d 959 (Kan. 1992), the Kansas court determined that “immorality” as used in its teacher certificate revocation statute meant “such conduct that by common judgment reflects on a teacher’s fitness to engage in his or her profession.” *Id.* at 967. The court reasoned that

[i]t would indeed be difficult, not to say impractical, in carrying out the purpose of the act, for the legislature to list each and every specific act or course of conduct which might constitute such unprofessional conduct Nor does any such failure leave the statute subject to attack on grounds of vagueness or indefiniteness.

Id. The dismissed teacher was on adequate notice that burglary was prohibited within the term “immorality,” the court held, observing that one of the goals of education was to instill respect for the law and that teachers consequently were expected to serve as role models. *Id.* at 965. *See also Frison v. Franklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979) (North Carolina statutes “prescribing a teacher’s speech and conduct are necessarily broad; they cannot pos-

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

sibly mention every specific kind of misconduct,” and consequently, demoted career teacher had “sufficient notice that her conduct [reading intercepted student note containing “vulgar colloquialisms” out loud to class] was unacceptable”).

The solitary authority relied upon by petitioner, *Burton v. Cascade School Dist. Union High School No. 5*, 353 F. Supp. 254 (D. Oregon 1973), *cert. denied*, 423 U.S. 839, *aff’d*, 512 F.2d 850 (9th Cir. 1975), is neither controlling authority in this jurisdiction, *see State v. Richards*, 294 N.C. 474, 492, 242 S.E.2d 844, 851 (1978), nor persuasive, and further is distinguishable by failure of the court therein to follow the rule that statutes are to be construed whenever possible so as to uphold their constitutionality. *See Tetterton v. Long Manufacturing Co., Inc.* 314 N.C. 44, 49, 332 S.E.2d 67, 70 (1985) and, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 841, 92 L.E.2d 675, 686 (1986) (“statutes are to be so construed as to avoid serious doubt of their constitutionality”).

[2] Having determined “immorality” in the context of dismissal of a career teacher to mean such conduct that by common judgment reflects upon a teacher’s fitness to teach, we now examine petitioner’s argument that the statute is unconstitutionally vague as applied to the facts at hand. *See Maynard*, 486 U.S. at 361, 100 L.Ed.2d at 380.

First, petitioner’s contention the statute fails to give fair warning of what conduct is prohibited does not withstand scrutiny. As a public school teacher, petitioner bore the legal obligation to maintain discipline in school and to encourage temperance and morality. G.S. § 115C-307(a) and (b) (“It *shall* be the duty of all teachers . . . to maintain good order and discipline . . . [and] to encourage temperance [and] morality” (emphasis added)). Moreover, our Supreme Court has emphasized that teachers, in addition to being required to teach a particular subject, also serve as role models for their students in that teachers are:

intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil. It is not inappropriate or unreasonable to hold our teachers to a higher standard of personal conduct, given the youthful ideals they are supposed to foster and elevate.

BARRINGER v. CALDWELL COUNTY BD. OF EDUC.

[123 N.C. App. 373 (1996)]

Faulkner v. New Bern-Craven Bd. of Educ., 311 N.C. 42, 59, 316 S.E.2d 281, 291 (1984).

Accordingly, a reasonable public school teacher of "ordinary intelligence," *Crump*, 74 N.C. App. at 81, 327 S.E.2d at 601, and utilizing "common understanding," *Jordan v. De George*, 341 U.S. at 232, 95 L.Ed. at 892, would know that approaching a crowded pool room located in the general community where one serves as a teacher, in the early morning hours and armed with a fully-loaded shotgun and a sidearm, and subsequently proffering an explanation indicative of a violent intent, constituted conduct likely to become known to the general student population at the school where the teacher was employed, and would reflect to the teacher's "young charges," *Faulkner*, 311 N.C. at 59, 316 S.E.2d at 291, a poor example manifesting approval of violence and taking the law into one's own hands, consequently placing the teacher's professional position in jeopardy. See *Maynard v. Cartwright*, 486 U.S. at 361, 100 L.Ed.2d at 380.

Indeed, the law enforcement Arrest Report involving petitioner listed his occupation as "self-employed carpenter." Because this information apparently was derived from petitioner, it suggests an awareness on the part of petitioner that his conduct on the night in question bore a relation to his performance as a teacher. Were petitioner not concerned his actions placed his position as career teacher "at risk," see *Maynard* at *id.*, the correct information presumably would have been provided to the officers.

Moreover, petitioner's argument that the statute "permits erratic and prejudiced exercises of authority" is contradicted by the Board's determination in its findings of fact of the required nexus between petitioner's "immorality" and his ability to perform the job of teacher:

14. As a result of Mr. Barringer's conduct and actions on March 20, 1993 at Pat's Pool Room and the publicity and notoriety that conduct received, his ability to effectively function as a teacher has been substantially and appreciably adversely affected; his ability to effectively serve as a role model to his own students and the other students at West Caldwell has been seriously impaired; his credibility in maintaining discipline and order, controlling weapons or incidents of violence on campus, and conveying the lessons of good citizenship have been damaged. Mr. Barringer has offered no explanation for his conduct or any extenuating circumstances. The incident constituted an immoral and highly dangerous conduct that, had law enforcement officers

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

not happened to be at the scene, was likely to have led to violent injury or death of innocent people; the example of his conduct violates every important principal [sic] of good citizenship that the teaching profession aims to impart to students.

Based on the foregoing, we hold that G.S. § 115C-325(e)(1)b is constitutional, both as written and as applied to the circumstances *sub judice*, and affirm the order of the trial court.

Affirmed.

Judges COZORT and WALKER concur.



JAMES M. PARKER AND WIFE, PATSY PARKER, PLAINTIFFS, v. HAROLD A. ERIXON
AND, CHEMICAL LEAMAN TANK LINES, INC., DEFENDANTS

No. COA95-33

(Filed 6 August 1996)

**Carriers § 92 (NCI4th)— collision with leased tractor—lessee
responsible only for acts committed within scope of
lessor's employment**

North Carolina follows the rebuttable presumption of agency view under which an employment relationship is presumed between the parties bound by I.C.C. regulations, but this is rebuttable, and the carrier-lessee's liability is ultimately determined by resort to common law doctrines such as respondeat superior which generally operate to make the principal vicariously liable for the tortious acts committed by the agent within the scope of the agent's employment; therefore, the trial court erred in granting summary judgment for plaintiff in an action against the common carrier-lessee to recover for injuries received in a collision with the owner-lessor of a tractor where the owner deviated from the lease agreement with defendant carrier and was acting outside the scope of his employment when the accident occurred.

Am Jur 2d, Automobile Insurance § 422.

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

Appeal by defendant Chemical Leaman Tank Lines, Inc. from order entered 28 November 1994 by Judge W. Allen Cobb, Jr. in Pender County Superior Court. Heard in the Court of Appeals 5 October 1995.

Mason and Boney by William Joseph Boney, Jr. for plaintiff-appellees.

Johnson and Lambeth, by John G. Tillery, III and Robert White Johnson for defendant-appellants.

McGEE, Judge.

The parties stipulated to the following facts. On 18 December 1991, defendant Harold A. Erixon (Erixon) was the owner and operator of a 1990 White GMC highway tractor which he had leased, by an independent contractor service agreement, to defendant Chemical Leaman Tank Lines, Inc. (Chemical Leaman). The tractor bore an Interstate Commerce Commission (I.C.C.) identification code registered to Chemical Leaman. The contract between the lessee Chemical Leaman, a common carrier, and the lessor Erixon, the independent contractor and driver of the tractor which hauled Chemical Leaman's trailer, was governed by Interstate Commerce Commission rules and regulations.

On 17 December 1991, Erixon left Texas with his tractor pulling a Chemical Leaman trailer loaded with materials bound for the DuPont plant near Wilmington, North Carolina. Erixon arrived in North Carolina on the morning of 18 December 1991 and dropped the trailer at the Chemical Leaman yard. That afternoon, Erixon went off duty and departed the yard in his tractor bound for Trenton, North Carolina on a personal trip to visit his son. It was Erixon's intention to reattach the trailer to his tractor early on the morning of 19 December 1991 and deliver the trailer to the DuPont plant. While he was traveling to his son's house, Erixon crossed the centerline and collided head-on with plaintiff, James M. Parker.

On 13 October 1992, James Parker and his wife, Patsy, filed a civil action against Erixon and Chemical Leaman for injuries and damages resulting from the motor vehicle collision. Erixon filed an answer to the complaint on 25 November 1992 denying negligence and alleging sudden emergency and contributory negligence. On 30 November 1992, Chemical Leaman filed an answer and crossclaim contending it was not liable for Erixon's negligence under North Carolina state law

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

because Erixon was neither employed by nor under the direction or control of Chemical Leaman when the accident occurred. Erixon filed a reply to the crossclaim on 3 December 1993. Pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, plaintiffs and Chemical Leaman filed a dismissal with prejudice of all claims against Erixon on 29 March 1994.

Chemical Leaman filed a motion for summary judgment against plaintiffs. This motion was heard by the court at the 6 February 1994 term of the Civil Superior Court for Pender County. On 28 November 1994, the court entered an order denying Chemical Leaman's motion for summary judgment and granting plaintiffs' Rule 56 motion for summary judgment as to the issue of agency between Chemical Leaman and Erixon. The trial court's order stated "there exists in law and fact an irrebuttable presumption of agency between the Defendant, Chemical Leaman Tank Lines, Inc. and the Defendant, Harold A. Erixon." From this order, Chemical Leaman appeals.

The question for this Court is whether the law supports the trial court's conclusion that there is an irrebuttable presumption of agency between the carrier, Chemical Leaman, and the independent contractor, Harold Erixon. If so, then Chemical Leaman will be held strictly liable for all of Erixon's actions, regardless of whether Erixon was acting outside the scope of his employment at the time the negligent act occurred. Our state courts have only briefly addressed this issue and the Fourth Circuit Court of Appeals has only dealt with the issue of liability when an independent contractor hauling cargo under a carrier's I.C.C. authority is acting within the scope of employment with the carrier. See *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974).

The I.C.C. regulation at issue in this case is the provision entitled "*Exclusive possession and responsibilities*":

The lease [between independent contractor and carrier] shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee *shall assume complete responsibility* for the operation of the equipment *for the duration of the lease*.

49 C.F.R. Chapter X § 1057.12(c)(1) (1995) (emphasis added). This language has caused confusion and two lines of authority have

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

emerged on this issue, being a rebuttable versus an irrebuttable presumption of agency (employment) between the independent contractor and the carrier. *Wyckoff v. Marsh Bros. Trucking*, 569 N.E.2d 1049, 1052 (1991).

Under the rebuttable presumption of agency view, an employment relationship is presumed between the parties bound by the I.C.C. regulations, but this is rebuttable, and "the carrier-lessee's liability is ultimately determined by resort to common-law doctrines such as *respondeat superior*" which generally operate to make the principal vicariously liable for the tortious acts committed by the agent within the scope of the agent's employment. *Id.*; *See also Wilcox v. Transamerican Freight Lines, Inc.*, 371 F.2d 403, 404 (6th Cir. 1967), *cert. denied*, 387 U.S. 931, 18 L. Ed. 2d 992 (1967); *McLean Trucking Co. v. Occidental Casualty Co.*, 72 N.C. App. 285, 289-91, 324 S.E.2d 633, 635-36, *disc. review denied*, 313 N.C. 603, 330 S.E.2d 611 (1985) (discussing the I.C.C. regulations and cases in various circuits which hold the carrier strictly liable versus other circuits which impose liability only when the contractor is operating in the business of the carrier).

A second line of authority is that the I.C.C. regulations create an irrebuttable presumption of agency between parties, which is referred to as the doctrine of statutory employment. *Wyckoff*, 569 N.E.2d at 1053. Under this view, the courts strictly construe the I.C.C. regulations. For the duration of the lease, a carrier is held liable as a matter of law for all acts of independent contractors, regardless of whether or not the contractor was acting within the scope of his employment at the time the negligence occurred. *Id.*; *See also Rodriguez v. Ager*, 705 F.2d 1229, 1235-36 (10th Cir. 1983); *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973).

The Fourth Circuit Court of Appeals considered whether a carrier is liable for the negligent acts of an independent contractor when the contractor is operating within the business of the carrier in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89, 90 (4th Cir. 1974). The court stated the I.C.C. "regulations were promulgated by the Commission to correct widespread abuses incident to the use of leased equipment by the carriers." *Proctor*, 494 F.2d at 91-92. "The statute and regulatory pattern [of the I.C.C. regulations] clearly eliminates the independent contractor concept from . . . lease arrangements and casts upon [the carrier] full responsibility for the negligence of [the driver] of the leased equipment." *Id.* at 92.

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

Since *Proctor* was decided, the I.C.C. regulations have been reorganized. See *Ryder Truck Rental Co., Inc. v. UTF Carriers, Inc.*, 719 F. Supp. 455, 457-58 (W.D. Va. 1989), *affirmed*, 907 F.2d 34 (4th Cir. 1990) (discussing the history of the I.C.C. regulations). In *Penn v. Virginia Intern. Terminals, Inc.*, 819 F. Supp. 514 (E.D. Va. 1993) the federal district court discussed *Proctor*, as well as a line of Indiana cases, which held carriers strictly liable on the theory that I.C.C. regulations have eliminated the independent contractor concept and therefore traditional common law doctrines of employer-employee and *respondeat superior* do not determine I.C.C. carrier liability. *Penn*, 819 F. Supp. at 521-22. The *Penn* Court noted that in 1992, the I.C.C. amended the regulations dealing with written lease requirements by adding the following provision:

Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 11107 and attendant administrative requirements.

49 C.F.R. Chapter X § 1057.12(c)(4). This new provision, according to the *Penn* Court, "confirm[ed] the Commission's view that the type of control required by the [I.C.C.] regulation[s] does not affect 'employment' status and that it is not the intention of the regulations to affect the relationship between a motor carrier lessee and the independent owner-operator lessor." *Penn*, 819 F. Supp. at 522 (citation omitted). After discussing the new I.C.C. regulations, the *Penn* Court stated the Indiana cases holding carriers strictly liable were "based upon an interpretation of the ICC regulations that were unintended by the ICC." *Id.* at 523. The *Penn* Court further declared:

Those cases find that an employer-employee relationship between lessee-lessor is mandated by the provision of 49 C.F.R. § 1057.12(c)(1), which places exclusive possession, control, use and operation of the leased equipment under the lessor. This Court believes that is a misinterpretation of the regulation, especially with the hindsight provided by the 1992 amendment to 49 C.F.R. § 1057.12(c).

Id.

I.C.C. decisions appear to support the *Penn* court's view. In *Ex Parte No. MC-203 Petition to Amend Lease and Interchange of*

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

Vehicle Regulations, 8 I.C.C.2d 669, 670 (1992), the Commission said, “[the petitioners’] proposed amendment [to add paragraph (c)(4)] is designed to give notice to the courts and worker’s compensation or other administrative tribunals that our ‘control regulation’ in 49 C.F.R. § 1057.12(c)(1) . . . is not intended to affect the relationship between a motor carrier lessee and the independent owner-operator lessor.” The Commission concluded:

The Commission’s regulations are silent on the agency status of lessors, and our decisions are clear that the Commission has taken no position on the issue of independence of lessors. However, we are convinced by the comments that the proposed amendment will serve a useful purpose and should be adopted

While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect “employment” status, it has been shown here that some courts and State workers’ compensation and employment agencies have relied on our current control regulation and have held the language to be *prima facie* evidence of an employer-employee relationship. These State agencies often find that the current regulation evidences the type of control that is indicative of an employer-employee relationship.

We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation’s impact. . . . By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the factfinders and the carriers time and expense.

Ex Parte No. MC-203, 8 I.C.C.2d at 671 (citation omitted). In an earlier decision the Commission, commenting on the effect of displaying I.C.C. placards after the lease has been terminated said, “[t]he Commission did not intend that its leasing regulations would supersede otherwise applicable principals [sic] of State tort, contract, and agency law and create carrier liability where none would otherwise exist.” *Ex Parte No. MC-43 (SUB-NO. 16.)*, Lease and Interchange of Vehicles (Identification Devices), 3 I.C.C.2d 92, 93 (1986).

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

While our state courts have not directly addressed this question, plaintiffs contend the facts of an earlier North Carolina case, *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E.2d 71 (1947) are “strikingly similar” to the facts of this case and they urge us to follow the rules established in *Brown* by our Supreme Court. *Brown* is a 1947 workers’ compensation case in which the plaintiff truck driver leased his equipment to defendant L.H. Bottoms Truck Lines, Inc. for the purpose of hauling cargo from High Point to Norfolk, Virginia. Plaintiff died from injuries he received as a result of “an accident arising out of and in the course of his employment.” *Brown*, 227 N.C. at 302, 42 S.E.2d at 73. The Supreme Court addressed the question of whether *Brown* was an independent contractor or an employee for workers’ compensation purposes. The Court noted defendant Bottoms Truck Lines was a motor carrier of goods in interstate commerce and was therefore subject to the federal regulations and requirements of the Interstate Commerce Commission and that the plaintiff’s truck was only entitled to engage in interstate commerce under the authority vested in defendant by the Commission. *Id.* at 304, 42 S.E.2d at 74-75. The Court concluded:

Hence it would seem to follow that control of the operation for the period of the lease was given to the licensed carrier, and that the owner-driven truck was in contemplation of law in its employ and the driver for the trip stood on the relationship of its employee, as found by the Industrial Commission.

We think the applicable rule, under the facts here presented, is that the lease or contract by which the equipment of the authorized interstate carrier was augmented, must be interpreted as carrying the necessary implication that possession and control of the added vehicle was, for the trip, vested in the authorized operator.

Id. at 304-05, 42 S.E.2d at 75. We agree with plaintiffs that *Brown* established the rule that lessors who operate in interstate commerce under the license tags and authority granted to the lessee by the I.C.C. are deemed employees of the lessee for the duration of the trip. However, we do not read *Brown* as requiring the lessee to be held strictly liable for all of the actions of the lessor. A fact critical in the *Brown* case was that the plaintiff’s “death was due to an accident arising out of and in the course of his employment.” *Id.* at 302, 42 S.E.2d at 73. In this case, Erixon’s off-duty trip to visit his son constituted a distinct departure from his employment, and was not within the course and scope of his employment.

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

In two later cases, this Court answered insurance coverage questions for parties subject to the I.C.C. regulations and in each case, the Court briefly addressed the issue of carrier liability. See *McLean Trucking Co.*, 72 N.C. App. at 290-91, 324 S.E.2d at 636; *Reeves v. B&P Motor Lines, Inc.*, 82 N.C. App. 562, 565-66, 346 S.E.2d 673, 675-76 (1986). In *McLean Trucking Co.*, our Court said the I.C.C. has broad regulatory authority and that I.C.C. regulations modify the common law doctrine of *respondeat superior*. *McLean Trucking Co.*, 72 N.C. App. at 289, 324 S.E.2d at 636. The case discussed the I.C.C. requirements and how other circuits have interpreted these regulations. *Id.* at 289-90, 324 S.E.2d at 636. However, this Court declined to answer the question of whether North Carolina follows the irrebuttable presumption of agency holding carriers strictly liable stating, “[p]laintiff McLean’s [common carrier lessee] liability for the acts of defendant Wright [driver lessor] is not the issue before this court.” *Id.* at 290, 324 S.E.2d at 636.

A year later this Court suggested North Carolina follows the rebuttable presumption of agency and imposes liability on the carrier only when the independent contractor is acting in the course and scope of his employment when our Court said:

[W]e look to the public policy behind I.C.C. regulations, which imposes *strict liability* on the lessee-motor carrier for injuries to third parties *when the lessor-independent contractor is operating in the course and scope of the business of the lessee-motor carrier*. That policy is to prevent the motor carrier from avoiding safety standards (and insurance requirements) imposed by I.C.C. regulations by leasing equipment from non-regulated independent contractors.

Reeves, 82 N.C. App. at 565, 346 S.E.2d at 675 (emphasis added).

The I.C.C. regulations were not intended to impose upon carriers using leased equipment or the services of independent contractors greater liability than that imposed when a carrier uses its own equipment or employees. Under North Carolina law, liability of an owner of a motor vehicle for the acts of his employee is governed by the principle of *respondeat superior*. See *McNair v. Lend Lease Trucks, Inc.*, 62 F.3d 651, 654 (4th Cir. 1995). Under this principle, the employer is held vicariously liable for the negligent actions of his employee “if the negligent conduct occurred while the employee was acting within the course and scope of his employment.” *Id.* This same rule should apply to carriers who have leased equipment or arranged for the services of an independent contractor.

PARKER v. ERIXON

[123 N.C. App. 383 (1996)]

Having decided North Carolina follows the rebuttable presumption of agency, we now turn to the question of whether the trial court committed reversible error when it denied Chemical Leaman's summary judgment and granted plaintiffs' summary judgment as to the issue of agency between Chemical Leaman and Erixon. Specifically, Chemical Leaman contends it is entitled to summary judgment because Erixon, the owner of the tractor, deviated from the lease agreement with Chemical Leaman and was acting outside the scope of his authority when the accident occurred. We agree.

Summary judgment is granted by the trial court when there are no genuine issues as to material facts and where the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c); *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978). When a case involves a controversy on a question of law on indisputable facts, summary judgment is appropriate. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). In considering a summary judgment motion, the trial court construes all the evidence in a light favorable to the non-moving party, allowing the non-moving party a trial upon the slightest doubt as to the facts. *Moye v. Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

The parties have already stipulated to the facts which are critical in this appeal: Erixon leased his GMC tractor to Chemical Leaman under an independent contractor service agreement. Since Erixon did not have I.C.C. numbers of his own, his tractor bore Chemical Leaman's I.C.C. number and operated in interstate commerce only under the authority of Chemical Leaman's I.C.C. permits. On the afternoon of 18 December 1991, Erixon "went off duty and left in the tractor to drive to Trenton, North Carolina to visit his son. The trip from Wilmington to Trenton and back to Wilmington was purely personal." On the way to his son's house, Erixon collided head-on with James Parker. Under the doctrine of *respondeat superior*, Chemical Leaman is not liable for Erixon's actions while Erixon was acting outside the scope of his employment. We therefore reverse the order of the trial court and remand for entry of summary judgment in favor of defendant Chemical Leaman.

Reversed and remanded.

Judges MARTIN, John C. and JOHN concur.

POWELL v. DOE

[123 N.C. App. 392 (1996)]

EDWARD L. POWELL, ADMINISTRATOR OF THE ESTATE OF NERYS FLORES, DECEASED v.
JOHN DOE, A HIT AND RUN DRIVER, AND AN UNNAMED DEFENDANT, THE UNINSURED
MOTORIST CARRIER

No. COA95-437

(Filed 6 August 1996)

1. Automobiles and other Vehicles § 861 (NCI4th)— hit-and-run accident—failure to show negligence

Plaintiff's cause of action for common law negligence and the violation of statutorily imposed duties of care failed where no evidence was forecast establishing any negligence whatsoever arising from the hit-and-run driver's role in the accident.

Am Jur 2d, Automobile and Highway Traffic §§ 289-295.

2. Automobiles and Other Vehicles § 856 (NCI4th)— hit-and-run statute—per se negligence statute—no evidence of violation

Though the hit-and-run statute, N.C.G.S. § 20-166, is indeed a *per se* negligence statute, plaintiff did not sufficiently forecast evidence of a § 20-166 violation where plaintiff did not show that decedent would have been aided in any way by the driver's stopping at the scene and rendering the aid mandated by the statute.

Am Jur 2d, Automobile and Highway Traffic §§ 289-295.

Appeal by plaintiff from summary judgment entered 24 February 1995 by Judge F. Donald Bridges in Forsyth County Superior Court. Heard in the Court of Appeals 29 January 1996.

Randolph and Fischer, by Rebekah L. Randolph, for plaintiff appellant.

Hutchins, Doughton & Moore, by Laurie L. Hutchins, for defendant appellee.

SMITH, Judge.

Plaintiff brought this action to recover damages for the fatal injury suffered by Nerys Alexander Flores (Flores or decedent) due to the alleged common law and *per se* negligence of an unknown hit and run driver. We hold that plaintiff has not forecast evidence establishing his claims of negligence and affirm the trial court's grant of summary judgment to the unnamed defendant.

POWELL v. DOE

[123 N.C. App. 392 (1996)]

Plaintiff's evidence tends to show that on 23 May 1994, Flores was walking along a roadway in Forsyth County, North Carolina, when he was struck and killed by an automobile. The tortfeasor was never located or identified. Winston-Salem Police Officer Troy Davis Monroe investigated the accident. In his deposition, Officer Monroe described the accident scene in detail. Decedent was found lying dead on the incline of a ditch, adjacent to the roadway. Shards of broken glass were found at the scene, and decedent had glass in his hair. Officer Monroe concluded that some of the glass was from a broken windshield and some from a broken signal lamp lens.

Officer Monroe opined from the position of decedent's body, a "scuff" mark on the road, and the glass debris, that decedent had been walking in the direction of traffic when he was struck. Officer Monroe was unable to conclude from the accident scene and his observation of decedent's body whether the hit and run driver had violated any vehicular laws, other than the statutory duty to stop and render aid at the scene of an accident. *See* N.C. Gen. Stat. § 20-166(a) and (b) (1993).

An autopsy revealed extensive blunt trauma to various parts of decedent's body. The Medical Examiner noted the cause of death was "multiple injuries." There is evidence in the record indicating that decedent's wounds were consistent with that of a person struck by a car. Plaintiff brought suit against the unknown hit and run driver and decedent's uninsured motorist carrier (the unnamed defendant), pursuant to N.C. Gen. Stat. § 20-279.21(b)(3)(b) (1993).

The trial court granted the unnamed defendant's motion for summary judgment, finding no genuine issues of material fact in dispute and that defendant was entitled to judgment as a matter of law. The gravamen of plaintiff's complaint against the hit and run driver and the uninsured motorist carrier lies in tort, as plaintiff maintains the hit and run driver's conduct amounted to a willful, wanton, and malicious negligent act, and was an act constituting negligence *per se*. We conclude that plaintiff's cause of action for negligence fails for lack of a forecast of evidence establishing all elements of his claims. Plaintiff's claim of negligence *per se* fails, similarly, as plaintiff has not forecast evidence demonstrating how the hit and run driver's failure to render aid at the scene of an accident either caused or exacerbated decedent's injury. As a result of plaintiff's failure to forecast essential elements of his causes of action, we affirm the trial court's grant of summary judgment.

POWELL v. DOE

[123 N.C. App. 392 (1996)]

A party will prevail on a motion for summary judgment only if the moving party (here, defendant) can show that no material facts are in dispute, and entitlement to judgment as a matter of law. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 905 (1995), *disc. review allowed*, 342 N.C. 658, 467 S.E.2d 718 (1996). In addition, the record is to be viewed in the light most favorable to the nonmovant, giving it the benefit of all inferences which reasonably arise therefrom. *Id.* The moving party will prevail if it can show that “ ‘an essential element of the opposing party’s claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.’ ” *Andersen v. Baccus*, 335 N.C. 526, 530, 439 S.E.2d 136, 138 (1994) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Evidence properly considered on a motion for summary judgment “includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.” *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). In addition, by properly verifying a complaint, plaintiff is entitled to have allegations within it which are based on personal knowledge “considered as equivalent to a supporting or opposing affidavit, as the case may be.” *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 213 (1972) (quoting 6 James W. Moore, et al., *Moore’s Federal Practice*, par. 56.11[3] at 2176 (2d ed. (1965))).

[1] Plaintiff’s instant cause of action, which arises from claims of common law negligence and the violation of statutorily imposed duties of care, is not cognizable. It is well-settled law that an action based on negligence will lie if a tortfeasor “fail[s] to exercise that degree of care which a reasonable and prudent person would [have] exercise[d] under similar conditions.” *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). “A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a *duty* to use reasonable care.” *Id.* (emphasis added).

Plaintiff’s complaint also alleges the hit and run driver breached several statutory duties of care owed decedent by, *inter alia*, “driving too fast for conditions” (N.C. Gen. Stat. § 20-141 (a) (1993)), “[o]per-

POWELL v. DOE

[123 N.C. App. 392 (1996)]

ating his motor vehicle in a careless and reckless manner" (N.C. Gen. Stat. § 20-140(a) and (b) (1993)), failing "to keep a proper lookout" (*see generally* N.C. Gen. Stat. § 20-174 (1993)), and "fail[ing] to yield the right of way to pedestrian traffic" (N.C. Gen. Stat. § 20-174(e) (1993)). Plaintiff's complaint is not based on personal knowledge, is not verified, and may not be considered an affidavit. Therefore, our analysis turns to the record for a determination of whether plaintiff has forecast evidence establishing the hit and run driver's negligence under common law, or for breach of one of the above listed statutorily imposed duties.

After reviewing the record, including the autopsy report of Dr. G.J. Davis, Forsyth County Medical Examiner (which we note was unsigned), and the deposition of Officer Troy Davis Monroe, we conclude that no evidence has been forecast establishing any negligence whatsoever arising from the hit and run driver's role in the accident. Based on the record before us, all that can be said is that decedent was struck by a vehicle, and that the driver of that vehicle did not stop or return to the scene of the accident. These facts alone are not enough to establish a breach of duty owed the decedent by the hit and run driver, *i.e.*, there is no forecast of negligence relevant to these claims in the record.

In *First Union National Bank v. Dairy, Inc.*, this Court reviewed the difficulty of establishing negligence in cases such as this. *Dairy*, 20 N.C. App. 101, 105, 201 S.E.2d 76, 79 (1973), *cert. denied*, 285 N.C. 85, 203 S.E.2d 57 (1974). In *Dairy*, we noted

"If it be conceded that the plaintiff's intestate was injured and killed upon the highway by being struck by the defendants' truck, or by a board or piece of lumber on said truck, in the *absence of any evidence of where* on the highway the intestate was at the time of being stricken, *or of when* he got on the highway, *or of how long* he had been on the highway before being stricken, the plaintiff's case must fail. *The mere fact that he was injured and killed does not constitute evidence that his injury and death were proximately caused by the negligence of the defendants.*"

Dairy, 20 N.C. App. at 105, 201 S.E.2d at 78-79 (emphasis added) (citation omitted); and *see Thompson v. Coble*, 15 N.C. App. 231, 232, 189 S.E.2d 500, 501, *cert. denied*, 281 N.C. 763, 191 S.E.2d 360 (1972).

Simply put, running over a person, and then leaving the scene, is not negligence in and of itself. *Mills v. Moore*, 219 N.C. 25, 29, 12

POWELL v. DOE

[123 N.C. App. 392 (1996)]

S.E.2d 661, 663 (1941); and *see Dairy*, 20 N.C. App. at 105-06, 201 S.E.2d at 79. Merely establishing that defendant left the scene is not the same as demonstrating that defendant's conduct *in hitting decedent* was negligent. *Mills*, 219 N.C. at 29, 12 S.E.2d at 663. There are reasons, other than fault, which could explain why a person might accidentally hit someone and then leave the scene.

First of all, the alleged tortfeasor might not even know that he has hit anyone with his automobile. The *Mills* Court was faced with just this scenario and concluded that

[t]he physical facts present no reasonable theory to the exclusion of many others as to the circumstances under which the accident occurred. . . . The evidence is consonant with any of many theories which may be advanced with equal force, but all of which are speculative and rest on mere conjecture.

Mills, 219 N.C. at 30, 12 S.E.2d at 664. Human nature being as it is, it is conceivable that the hit and run driver left the scene out of panic. Without doubt, there are other reasons why someone might leave the scene of an accident, reasons totally disconnected from any application to questions of negligence.

In the instant case, there is some tenuous evidence which suggests that the hit and run driver might have known he had hit someone. We note that Officer Monroe's deposition testimony includes hearsay statements indicating the medical examiner had concluded the decedent might have been flipped onto the hood of the oncoming vehicle at impact. Aside from the questionable admissibility of this hearsay evidence, the medical examiner's "conclusions" do not speak dispositively to the issue of negligence. All that is proven from Officer Monroe's hearsay is that a vehicle struck a pedestrian and maybe the driver knew it—but this is not enough. We are asked to reverse the trial court on little more than speculation and conjecture. This we are unable to do.

We are also aware of, and acknowledge, the visceral tendency of people to seek an assignment of blame for tragedies such as this one. However, the rules governing negligence exist precisely for the purpose of apportioning such blame, and those rules dictate that we uphold summary judgment. Plaintiff has simply not made out a *prima facie* case on his common law negligence claims, or his claims based on the breaches of statutorily imposed duties enumerated *ante*.

POWELL v. DOE

[123 N.C. App. 392 (1996)]

[2] The remaining issue is whether the hit and run driver is liable under a *per se* negligence theory, based on his violation of N.C. Gen. Stat. § 20-166(a) and (b). This Court has held that, “[w]hen a statute sets a standard of care for the protection of others, violation of that statute is negligence *per se*.” *Hinnant v. Holland*, 92 N.C. App. 142, 147, 374 S.E.2d 152, 155 (1988), *disc. review denied*, 324 N.C. 335, 378 S.E.2d 792 (1989).

The statute at issue, N.C. Gen. Stat. § 20-166 is entitled: “Duty to stop in event of accident or collision; furnishing information or assistance to injured person” The applicable portions of § 20-166 state:

(a) **(Effective until January 1, 1995)** The driver of any vehicle who knows or reasonably should know:

- (1) That the vehicle which he is operating is involved in an accident or collision; and
- (2) That the accident or collision has resulted in injury or death to any person;

shall immediately stop his vehicle at the scene of the accident or collision. He shall remain at the scene of the accident until a law-enforcement officer completes his investigation of the accident or collision or authorizes him to leave; Provided, however, that he may leave to call for a law-enforcement officer or for medical assistance or medical treatment A willful violation of this subsection shall be punished as a Class I felony.

* * * *

(b) **(Effective until January 1, 1995)** In addition to complying with the requirement of (a), *the driver as set forth in (a) . . . shall render to any person injured in such accident or collision reasonable assistance*, including the calling for medical assistance if it is apparent that such assistance is necessary or is requested by the injured person. A violation of this subsection is a misdemeanor

(Emphasis added); and *see State v. Fearing*, 48 N.C. App. 329, 334, 269 S.E.2d 245, 247-48 (1980), *aff'd in part, rev'd in part on other grounds*, 304 N.C. 471, 284 S.E.2d 487 (1981). A plain reading of § 20-166 indicates it exists for safety purposes and imposes a duty of care upon a person whose vehicle collides with another person.

POWELL v. DOE

[123 N.C. App. 392 (1996)]

In *Fearing* this Court concluded that the general purpose of § 20-166 is to “facilitate investigation of automobile accidents *and to assure immediate aid to anyone injured by such collision.*” *Fearing*, 48 N.C. App. at 334, 269 S.E.2d at 248 (emphasis added). The *Fearing* Court also held that application of the statute is not dependent on fault. *Id.* Additionally, the *Fearing* Court determined that § 20-166 requires proof that the defendant was driving the automobile causing injury or death, and that defendant, knowing he had struck the victim, failed to stop immediately at the scene and render assistance. *Id.*

In the instant case, both plaintiff and defendant have briefed the *per se* negligence issue without contesting this theory’s validity as an independent cause of action. There does not appear to be any case within this state addressing the use of § 20-166 as a method of establishing negligence as a matter of law. Even so, we note that our Civil Pattern Jury Instructions currently employ the statute for just such a use. *See* N.C.P.I., Civ. 217.10 (Motor Vehicle Volume) (“DUTY TO STOP AND RENDER AID AT THE SCENE OF AN ACCIDENT”).

Given the absence of controlling precedent, we have reviewed the use of statutes similar to § 20-166 in other jurisdictions. Our review reveals that a persuasive number of jurisdictions employ duty to aid statutes as a means of establishing negligence *per se*. Annotation, *Violation of Statute Requiring One Involved in an Accident to Stop and Render Aid as Affecting Civil Liability*, 80 A.L.R.2d 299, 306 (1961). It is generally recognized that violation of a § 20-166-style statute is negligence *per se* if new injuries, or an aggravation of original injuries, occurs after the hit and run driver leaves the scene of an accident without rendering needed aid to the injured person. *Id.*; and *see Cheevers v. Clark*, 449 S.E.2d 528, 530 (Ga. Ct. App. 1994) (violation of criminal statute creating duty to render assistance is also negligence *per se*); *Boyer v. Gulf, Colorado & Santa Fe Railway Co.*, 306 S.W.2d 215, 222 (Tex. Civ. App. 1957) (violation of Article 1150 (duty to render assistance) of the Penal Code of Texas gives rise to negligence *per se*); *Brooks v. Willig Truck Transp.*, 255 P.2d 802, 809 (Cal. 1953) (“Failure to stop and render aid constitutes negligence as a matter of law, in the absence of a legally sufficient excuse or justification.”)

It seems obvious that any negligence in failing to stop after an accident cannot be the proximate cause of the occurrence of the accident itself, or of any immediate injury or death resulting therefrom.

POWELL v. DOE

[123 N.C. App. 392 (1996)]

Thus, use of the otherwise penal § 20-166 as the standard for negligence *per se* will only be appropriate when the evidence shows that the hit and run driver's failure to stop and render aid either exacerbated the injury, resulted in unnecessary pain and suffering, or resulted in an avoidable death.

Further, we note that our statute requires evidence that the automobile operator knew, or should have known, that his vehicle was involved in an accident or collision resulting in injury or death. If the vehicle operator is cognizant that he has hurt someone, the duty to render assistance obtains. *Fearing*, 48 N.C. App. at 334, 269 S.E.2d at 248. The duty to aid an injured person includes provision of reasonable assistance to the injured person, and the calling for medical assistance. Sometimes, the rendering of aid will necessitate the driver leaving the scene *momentarily* in order to seek out help. In our opinion, recognition of § 20-166 as a *per se* rule establishes a well-reasoned standard, and comports with the *Hinnant* Court's holding concerning such use of safety statutes. *Hinnant*, 92 N.C. App. at 147, 374 S.E.2d at 155.

Having thus concluded that § 20-166 is indeed a *per se* negligence statute, we now turn to the question of whether the instant plaintiff has sufficiently forecast evidence of a § 20-166 violation. It is apparent plaintiff has not. Even accepting *arguendo*, that the hit and run driver had knowledge of the accident, plaintiff has not shown that decedent would have been aided in any way by the driver stopping at the scene and rendering the aid mandated by § 20-166. For example, the record is devoid of any forecast of evidence that decedent was still alive after the accident, or that his injuries could have been alleviated in some manner by the hit and run driver.

It is up to plaintiff to present a *prima facie* case, and he has not done so. For this reason, we conclude that summary judgment on the negligence *per se* issue was properly granted in favor of defendant. As such, the trial court's grant of summary judgment for defendant on all negligence issues is hereby

Affirmed.

Judges JOHNSON and JOHN concur.

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

L. PENDLETON HAYES AND EDWARD WHALEN, PETITIONERS v. SAM FOWLER,
BUILDING INSPECTOR, AND VILLAGE OF PINEHURST BOARD OF ADJUSTMENT,
RESPONDENTS

No. COA94-893

(Filed 6 August 1996)

1. Zoning § 50 (NCI4th)— bed and breakfast—no accessory use permitted by ordinance

The trial court properly held that use of a piece of property as a bed and breakfast did not constitute an “accessory use” as permitted by the zoning ordinance, and there was no merit to petitioners’ contention that their proposed rental of four of the eleven bedrooms of the house would, under the ordinance definition of “accessory use,” be “customarily incidental” to their use of the structure as a private residence, since the language of the ordinance indicated with particularity the intent of the drafters that bed and breakfast establishments be excluded as permitted accessory uses within the district.

Am Jur 2d, Zoning and Planning §§ 52, 233, 704.

What is lodginghouse or boardinghouse within provisions of zoning ordinance or regulation. 64 ALR2d 1167.

2. Zoning § 71 (NCI4th)— permit to operate bed and breakfast denied—decision not arbitrary and capricious

There was no merit to petitioners’ contention that the decision by respondent board of adjustment to deny them a permit to operate a bed and breakfast was arbitrary and capricious.

Am Jur 2d, Zoning and Planning §§ 42, 55, 63, 106, 140, 584, 724, 879.

Right to cross-examination of witnesses in hearings before administrative zoning authorities. 27 ALR3d 1304.

Requirement that zoning variances or exceptions be made in accordance with comprehensive plan. 40 ALR3d 372.

3. Zoning § 48 (NCI4th)— church defined—nonconforming use of property—continuation of use permitted

The plain and ordinary meaning of “church,” as used in the context of the Village of Pinehurst Zoning Ordinance § 5.3.2, is “a

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

building set apart for public worship”; therefore, the trial court properly determined that a building used by a church for meetings, bridge club meetings, classes, retreats, and dinners had not been used as a church, but was used in a manner deemed nonconforming under the ordinance, that petitioners could continue such use, and that such use did not allow for expansion of the nonconforming use.

Am Jur 2d, Zoning and Planning §§ 435-447.

Due process clause as violated by zoning regulations affecting churches. 74 ALR2d 377.

Change in volume, intensity, or means of performing nonconforming use as violation of ordinance. 61 ALR4th 806.

Change in type of activity of nonconforming use as violation of ordinance. 60 ALR4th 902.

Appeal by petitioners and respondents from order entered 1 July 1994 by Judge Ronald W. Burris in Moore County Superior Court. Heard in the Court of Appeals 10 May 1995.

Michael B. Brough & Associates, by Michael B. Brough, for Petitioners.

Poyner & Spruill, by Lacy H. Reaves and Robin T. Morris, for Respondents.

JOHN, Judge.

Petitioners and respondents each appeal certain aspects of the trial court's order reviewing a decision of the Pinehurst Board of Adjustment (the Board). For the reasons set out below, we affirm the trial court.

Relevant procedural and factual information is as follows: On 4 April 1994, L. Pendleton Hayes and husband, Edward Whalen (petitioners), applied to respondent Sam Fowler, Village of Pinehurst building inspector (Fowler), for a permit allowing renovations to a historic home (“Maryhurst”) which they had contracted to purchase. The owner of the property was the Catholic Diocese of Raleigh (the Diocese), and the premises, located approximately one-half block

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

away from Sacred Heart Catholic Church (Sacred Heart), have been used by Sacred Heart since 1987 or 1988 as a meeting place for religious and secular groups and for events such as choir practice, religious instruction classes, meetings of the Knights of Columbus, bridge club meetings, board meetings for Sandhills College and the O'Neal School, social gatherings and other community functions. Petitioners indicated to Fowler that they planned "to live in the house and provide rooms for overnight transient guests, host meetings of private groups and host various classes."

Fowler ruled that the proposed uses, aside from use as petitioner's residence, were impermissible under the applicable Village of Pinehurst ordinance (the ordinance). Petitioners appealed to the Pinehurst Board of Adjustment (the Board), which subsequently affirmed Fowler's decision. Petitioners thereafter filed a petition for Writ of Certiorari in Moore County Superior Court. Petitioners alleged the Board erred by refusing to view use of Maryhurst as a bed and breakfast and as a site for meetings, social gatherings and classes, to be "accessory" to their residential use of the property, and further by declining to allow petitioners to continue usages of the property as operated by the Diocese and Sacred Heart.

Following a hearing, the trial court affirmed in part and reversed in part the Board's decision in an order dated 1 July 1994. The court set out the following conclusions of law:

1) Petitioners' proposed use of their property ("Maryhurst") as a bed and breakfast, or Guest House (Tourist Home) . . . is not permissible [under the ordinance] as an "Accessory Use" [in the R-30 Zoning District];

2) . . . [U]se [of Maryhurst by Sacred Heart] did not constitute use of the property as a 'church' (emphasis in original) within the meaning of Section 5.3.2 of [the ordinance]. . . .

Therefore, use of the property . . . [by Sacred Heart] constituted a nonconforming use of the property which use may be continued by petitioners under Section 11 of the ordinance. . . .

3) The determination by the Board . . . was not arbitrary and capricious.

On appeal, respondents assign error to the trial court's second conclusion of law, while petitioners challenge the first and third.

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

The relevant sections of the ordinance read as follows:

SECTION 2. DEFINITIONS AND INTERPRETATIONS

Accessory Building and Construction. A subordinate use building or construction customarily incident to and located upon the same lot occupied by the main use building (guest cottages shall not be permitted).

Accessory Use. A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use of building (guest cottages shall not be permitted).

Guest House (Tourist Home). Any dwelling occupied by owner or operator in which rooms are rented for guests, for lodging of transients and travelers for compensation, and where food may be served.

SECTION 5.3.1

[Applicable, *inter alia*, to Residential Zone R-30]

These districts are established as districts in which the principal use of land is for single family dwellings. In promoting the general purposes of this Ordinance, the specific intent of each district is:

. . . .

b. To prohibit commercial and industrial use of the land

SECTION 5.3.2 Permitted Uses

a. Accessory uses clearly incidental to any permitted use and which will not create a nuisance or hazard (guest cottages shall not be permitted).

b. Churches

. . . .

Section 11. NON-CONFORMING USES**11.1 In General**

Upon the effective date of this Ordinance and any amendment hereto existing and lawful uses of any building or land which at that time do not meet the minimum requirements of this Ordinance for the District in which the same are located . . . shall

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

be considered as non-conforming. It is the intent of this Ordinance to permit these non-conforming uses to continue until they are removed, discontinued, or destroyed, but not to encourage such continued use, and to prohibit any further non-conformance or expansion thereof.

11.2 Non-Conforming Uses of Buildings

. . . .

If the non-conforming use of such building is discontinued for a period of one-hundred and twenty (120) days or more, every future use of such premises shall be in conformity with the provisions of this Ordinance

I.

[1] Petitioners first contend the trial court erred by failing to hold that use of Maryhurst as a bed and breakfast constituted an “accessory use” as permitted by the ordinance. Petitioners maintain their proposed rental of four of the eleven bedrooms at Maryhurst would, under the ordinance definition of “accessory use,” be “customarily incidental” to their use of the structure as a private residence. We disagree.

Questions involving interpretation of zoning ordinances are questions of law. *Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994). Accordingly, the superior court is to apply a *de novo* standard of review to Board decisions involving application and interpretation of zoning ordinances, and the court may freely substitute its judgment for that of the Board. *Ayers*, 113 N.C. App. at 530, 439 S.E.2d at 201. In like manner, on appeal of the judgment of the superior court, this Court must apply a *de novo* standard of review in determining whether “the superior court committed error of law in interpreting and applying the municipal ordinance,” *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 137, 431 S.E.2d 183, 187 (1993), and may also freely substitute its judgment for that of the superior court. *Id.*

In construing municipal ordinances, courts are obligated to adhere to the fundamental principles of statutory construction and interpretation. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh’g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). The basic requirement is that we “ascertain and effectuate the intent of the legislative body” as indicated by “the language of the

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

statute or ordinance, the spirit of the act and what the act seeks to accomplish.” *Id.*

Concerning the issue *sub judice*, *i.e.*, whether petitioners’ proposed use of Maryhurst as a bed and breakfast may be considered an “accessory use” contemplated by the ordinance, our *de novo* review reveals the intent of the ordinance to be reflected in Sections 2 and 5.3.2a. In these sections, “guest cottages” are *expressly excluded* from the definition of “accessory use.” Although petitioners correctly insist that “guest cottage” (emphasis added) is not defined in the ordinance, the term is indistinguishable from the phraseology “guest house (tourist home),” described in Section 2 of the ordinance as

[a]ny dwelling occupied by owner or operator in which rooms are rented for guests, for lodging of transients and travelers for compensation, and where food may be served.

The foregoing comports in all respects with petitioners’ proposed use of the property as a bed and breakfast. The language of the ordinance thus indicates with particularity the intent of the drafters that bed and breakfast establishments be excluded as permitted accessory uses within Zoning District [Zone] R-30, and the trial court did not err in affirming the Board’s ruling to that effect.

II.

[2] Petitioners also challenge the trial court’s rejection of their argument that the Board’s decision was arbitrary and capricious. This contention cannot be sustained.

In considering whether an administrative decision was indeed arbitrary and capricious, this Court is obligated to apply the “whole record” test. *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992). This requires an examination of all competent evidence within the entire record to determine whether the agency decision is supported by substantial evidence, *i.e.*, evidence a reasonable mind might accept as adequate to support a conclusion. *Id.* However, a court engaging in this process may not substitute its judgment for that of the administrative body, however compelling the circumstance, merely because reasonable but conflicting views emerge from the evidence. *Id.* Restrained by the foregoing standard and based upon a thorough review of the entire record herein, we conclude the Board’s decision cannot be characterized as arbitrary and capricious.

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

The Village of Pinehurst acted within its legislatively endowed prerogative, pursuant to N.C. Gen. Stat. § 160A-381, to enact a zoning ordinance prohibiting bed and breakfast establishments within Zone R-30. Even conceding *arguendo* petitioners' assertion that Maryhurst may best be utilized as a bed and breakfast, this alone does not suffice to classify the Board's decision as arbitrary and capricious, particularly in view of the specific prohibition contained within the ordinance.

Further, petitioners' allegation of a resulting substantive due process violation is untenable. Unlike *Mays-Ott Co., Inc. v. Town of Nags Head*, 751 F. Supp. 82 (E.D.N.C. 1990), upon which petitioners rely, no evidence was presented herein that the Village of Pinehurst approved use of Maryhurst as a bed and breakfast and then later withdrew such approval.

III.

A.

[3] Lastly, we turn to respondents' contentions concerning the trial court's second conclusion of law, *i.e.*, that Sacred Heart did not use Maryhurst "as a church" (emphasis in original Order) within the meaning of section 5.3.2 of the ordinance, and that Sacred Heart's nonconforming use of the property might therefore be continued by petitioners as permitted by section 11 of the ordinance. Respondents' arguments notwithstanding, we conclude the trial court did not err in its ruling.

Our *de novo* review of the superior court's statutory construction, see *Capricorn*, 334 N.C. at 137, 431 S.E.2d at 187, is complicated by absence within the ordinance of a definition of "church," and further by the lack of prior interpretation by our courts of the term "church" in the context of zoning regulations. Accordingly, we must construe "church" as set out in the instant ordinance by giving effect to the intent of the drafters, *Concrete Co.*, 299 N.C. at 629, 265 S.E.2d at 385, and by assigning to the term its plain and ordinary meaning, *Ayers*, 113 N.C. App. at 531, 439 S.E.2d at 201, but only such meaning that other modifying provisions and the context of the ordinance will permit. See also *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 224-25, 261 S.E.2d 882, 890-91 (1980) (reliance upon canons of statutory construction proper when ordinance does not define term).

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

The expression "church" ordinarily embraces three basic and related definitions: (1) a building set apart for public worship; (2) a place of worship of any religion; and (3) "the organization of Christianity or of an association of Christians" worshipping together (congregation). *Webster's Third New Int'l Dictionary* 404 (1968).

Respondents promote the third definition and contend "a church is an organization for religious purposes," citing *Williams v. Williams*, 215 N.C. 739, 744, 3 S.E.2d 334, 338 (1939), and *State v. Lynch*, 46 N.C. App. 608, 611, 265 S.E.2d 491, 493, *rev'd on other grounds*, 301 N.C. 479, 272 S.E.2d 349 (1980). Moreover, respondents continue, the drafters of the ordinance did not intend to limit the definition of "church" simply to a building in which religious services are held, but rather intended to encompass use *by* a church, as in the case *sub judice*, for its "parish house" or "fellowship hall" and other church-related purposes. Respondents do not claim worship services were held at Maryhurst, but instead contend use of the premises under the general auspices of Sacred Heart as a site for classes, meetings, retreats, and social activities, including special dinners and bridge club meetings, qualify Maryhurst for "church" status under the ordinance. Under the facts *sub judice*, respondents' argument is unpersuasive.

First, assuming *arguendo* that *Williams*, 215 N.C. 739, 3 S.E.2d 334, and *Lynch*, 46 N.C. App. 608, 265 S.E.2d 491, contain language supportive of respondent's position, we find these cases, which involved consideration of what composition of persons or organization constituted a "church," to be inapposite. The issue herein is zoning, or what particular use may be made of land and what types of buildings may be placed on particular property. See *Freewood Associates v. Board of Adjustment*, 28 N.C. App. 717, 720, 222 S.E.2d 910, 912, *cert. denied, appeal dismissed*, 290 N.C. 94, 225 S.E.2d 323 (1976) (purpose of a zoning law is to limit the use of land in the interest of public welfare).

Next, Section 5.3.2 of the ordinance permits "churches" within Zone R-30, as well as accessory uses, single family dwellings, public utility easements and buried distribution lines, and public wells and lift stations. Considered in this context, adoption of "an organization for religious purposes" as the ordinance definition of "church" would produce the unreasonable result that every building owned by a church or "organization for religious purposes" would qualify as a "church" for purposes of the ordinance. We are required to avoid

HAYES v. FOWLER

[123 N.C. App. 400 (1996)]

interpretations that produce absurd or illogical results, *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 549, 344 S.E.2d 821, 824, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 598 (1986), and therefore reject respondents' contention that Maryhurst constituted a "church" merely because it was owned by the Diocese and used by Sacred Heart. *See* 62 A.L.R. 3d at 201 ("... the proposed use of the land, and not the nature of the using organization . . . control[s] zoning cases"). Significant also in this context is the location of Maryhurst as a separate structure approximately one-half block from the property on which the Sacred Heart church building rests.

In sum, we believe the plain and ordinary meaning of "church," as used in the context of the Village of Pinehurst Zoning Ordinance Section 5.3.2, to be "a building set apart for public worship." *See Webster's* at 404. *See also* 62 A.L.R. 3d at 201 (among jurisdictions which have attempted to define "church" for zoning purposes, most have adopted definition substantially equivalent to "a building used for public worship"). *Synagogue v. Bates*, 136 N.E.2d 488 (NY 1956), advanced by respondents, is neither controlling authority in this jurisdiction, *see State v. Richards*, 294 N.C. 474, 492, 242 S.E.2d 844, 856 (1978), nor persuasive, and further is distinguishable on its facts and the language of the ordinance involved therein. Under the circumstances *sub judice*, the trial court therefore properly concluded that Maryhurst had not been used as a "church" under Section 5.3.2 of the ordinance.

B.

Respondents also maintain that Sacred Heart's right to use the property was protected as part of the guarantees of freedom of religion and assembly within the North Carolina Constitution, art. I, §§ 12 and 13, and the United States Constitution, amend. I, and that such protection transformed use of the property by Sacred Heart into a permitted use within the ordinance. This argument cannot be sustained.

The only relevant inquiry herein is whether the use of Maryhurst by Sacred Heart was a conforming use under the language of the ordinance, not whether the town could constitutionally have prevented a particular use of the premises by Sacred Heart. We have determined that Maryhurst was not used as a "church," and thus was used in a manner deemed nonconforming under the ordinance. Further, the ordinance expressly provides at Section 11 that

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

11.1 [i]t is the intent of this Ordinance to permit these non-conforming uses to continue

The trial court therefore did not err in holding that the “use may be continued by petitioners under . . . the ordinance.”

C.

Finally, we summarily reject respondents’ argument that the trial court erred by failing to hold petitioners’ proposed use to be different from and an expansion of that by Sacred Heart in contravention of the ordinance provision that “the non-conforming use of land shall not be enlarged or increased.” To the contrary, the trial court’s determination that Sacred Heart used Maryhurst “as any other community meeting center, *i.e.*, a site for meetings of organizations, committees, groups and for social events” is supported by the record, *see CG & T Corp.*, 105 N.C. App. at 40, 411 S.E.2d at 660, and such finding sustains the court’s conclusion, *see Trotter v. Hewitt*, 19 N.C. App. 253, 254, 198 S.E.2d 465, 466 (1973), that “use of the property in this fashion constituted a nonconforming use of the property, which . . . may be continued by petitioners under Section 11 of the ordinance.” Further, the trial court guarded against expansion of the nonconforming use and ensured petitioners’ awareness of the “nature and extent of such nonconforming use” by including attachments to its order listing the specific nonconforming activities and the parking impact of such activities.

Affirmed.

Judges COZORT and WALKER concur.

JULI DENNING-BOYLES, PLAINTIFF v. WCES, INC., AND HOWARD GEBEAUX, DEFENDANTS

No. COA94-1231

(Filed 6 August 1996)

**1. Intentional Infliction of Mental Distress § 2 (NCI4th)—
intentional infliction of emotional distress—summary
judgment improper**

In an action for intentional infliction of emotional distress and punitive damages, the trial court erred in entering summary

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

judgment for defendants when plaintiff offered a forecast of evidence that the editor of the newspaper for which she worked made numerous sexual comments and advances toward her; plaintiff's psychologist stated that plaintiff experienced severe, extreme, and disabling emotional distress as a result of this conduct; and the employer was given notice of the editor's behavior but took no action to stop it and thus ratified the employee's acts.

Am Jur 2d, Damages §§ 789-797; Employment Relationship § 248; Job Discrimination §§ 964, 966, 967; Labor and Labor Relations §§ 638, 3292; Master and Servant § 440.

On-the-job sexual harassment as violation of state civil rights law. 18 ALR4th 328.

When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.). 78 ALR Fed. 252.

Individual liability of supervisors, managers, or officers for discriminatory actions—cases postdating the Civil Rights Act of 1991. 131 ALR Fed. 221.

2. Pleadings § 378 (NCI4th)— amendment of complaint to add party—denial proper

The trial court did not err in refusing to allow plaintiff to amend her complaint in order to add the individual owner of a newspaper, which had employed her, as defendant, since, if the individual had any liability toward her, she knew it prior to filing suit, and adding the individual at the time of her motion would result in a delay of trial.

Am Jur 2d, Damages § 824; Job Discrimination § 2545; Labor and Labor Relations § 4589; Parties § 102.

Order with respect to motion for joinder of parties. 16 ALR2d 1023.

Amendment of pleading as to parties or their capacity as ground for continuance. 67 ALR2d 477.

Necessity of leave of court to add or drop parties by amended pleading filed before responsive pleading is served, under Federal Rules of Civil Procedure 15(a) and 21. 31 ALR Fed. 752.

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

Appeal by plaintiff from judgment and order entered 21 July 1994 by Judge Donald L. Smith in Harnett County Superior Court. Heard in the Court of Appeals 23 August 1995.

Brenton D. Adams for plaintiff appellant.

Bain & McRae, by Edgar R. Bain and Patrick H. Pope, for defendant appellee WCES, Inc.

JOHN, Judge.

Plaintiff appeals entry of summary judgment precluding claims against her former employer, defendant WCES, Inc. (WCES), for intentional infliction of emotional distress and punitive damages. She also appeals denial of her motion to amend her complaint. We conclude that summary judgment was improvidently granted.

Pertinent facts and background information include the following: in December 1992, plaintiff left her job as advertising manager of the *Harnett County News* to take a similar position with *The Harnett Leader*, a newspaper being established at that time in Harnett County by WCES. The same month, WCES also hired defendant Howard Gebeaux (Gebeaux) as editor of the fledgling publication.

According to allegations in plaintiff's complaint, very soon after Gebeaux was hired, he "began making uninvited and unwelcomed sexual advances toward the plaintiff which increased in their frequency and intensity throughout the entire time the plaintiff was employed" by WCES. Further, although plaintiff informed William A. Johnson and Rebecca Johnson Davidson, members of the board of directors of WCES, by February 1993 that she was being sexually harassed by Gebeaux, WCES took no action to prevent further misconduct by Gebeaux. Eventually, on 4 June 1993, plaintiff resigned her position with *The Harnett Leader* due to "intolerable conditions" on the job and her employer's alleged refusal to alleviate them.

Plaintiff filed suit against Gebeaux and WCES 22 June 1993, claiming she had "suffered severe mental and emotional distress" as the result of sexual harassment by Gebeaux, and that she "ha[d] been required to seek medical attention for this problem." Plaintiff sought compensatory and punitive damages for intentional infliction of emotional distress and also treble damages for unfair and deceptive trade practices under N.C.G.S. Chapter 75.

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

Following answers by both defendants and a motion for summary judgment by WCES filed 14 March 1994, plaintiff moved on 4 April 1994 to amend her complaint to add William A. Johnson (Johnson), president and chairman of the board of WCES, as an additional defendant. On 21 July 1994, the trial court granted summary judgment in favor of WCES on plaintiff's claims of intentional infliction of emotional distress, punitive damages, and unfair and deceptive trade practices. The court certified its judgment for immediate appeal pursuant to N.C.R. Civ. P. 54(b), finding that "even though fewer than all claims have been adjudicated in this 'final judgment,' there is no just reason for delaying the appeal." The trial court also denied plaintiff's motion to amend her complaint. Plaintiff filed notice of appeal to this Court 21 July 1994.

[1] Plaintiff first contends summary judgment was improper because "plaintiff presented a forecast of evidence which raised a genuine issue of material fact concerning the liability of [WCES] for intentional infliction of emotional distress and punitive damages." Plaintiff makes no argument regarding her claim for unfair and deceptive trade practices, and it is deemed abandoned pursuant to N.C.R. App. P. 28(a).

Summary judgment is to be entered only where

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.R. Civ. P. 56(c). The burden of establishing absence of a triable issue rests with the moving party, and the facts will be viewed in a light most favorable to the non-moving party. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). "Because the forecast of evidence as to the factual basis of each [claim of intentional infliction of emotional distress] is unique, each claim must be decided on its own merits." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 490, 340 S.E.2d 116, 121, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

The elements of intentional infliction of emotional distress are: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Hogan*, 79 N.C. App. at 487-88, 340 S.E.2d at 119. It is a question of law whether the alleged conduct on the part of defendant "may be reasonably regarded as

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

extreme and outrageous;" however, once shown, "it is for the jury to determine . . . whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability." *Id.* at 490-91, 340 S.E.2d at 121. The conduct must "exceed[] all bounds of decency tolerated by society." *West v. King's Department Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988).

WCES makes no argument that plaintiff's evidentiary forecast was insufficient to support plaintiff's claim for intentional infliction of emotional distress against Gebeaux. Indeed, in its appellate brief WCES concedes that "[t]he only issue before the trial judge in considering defendant's motion for summary judgment" was whether the record before the court "would entitle plaintiff to recover against WCES." Although liability of Gebeaux is essential if WCES is to be held responsible under a theory of *respondeat superior*, a brief review of the record reveals an evidentiary forecast more than sufficient to take plaintiff's claims against Gebeaux to the jury.

Without setting out the crudest vulgarities contained in the record, we note it indicates that Gebeaux made repeated sexual comments to plaintiff at the newspaper office on almost a daily basis. For example, plaintiff alleges that Gebeaux "many, many times" made remarks such as "I want to screw you and watch you beg for more;" that, on a Saturday when both were working, Gebeaux

begged the plaintiff to go home and spend the day with him He would come back and forth to the plaintiff's office saying things like: "This is the last chance for the best sex you'll ever have . . . ;"

that, on 22 April, Gebeaux asked plaintiff to "go to his house" for a sexual encounter; and that, when plaintiff consistently rejected him, he accused her of having lesbian relationships.

Other employees indicated Gebeaux asked plaintiff: "How's your sex life with Ray [plaintiff's husband]? How many times a week do you have sex?" and "Where's the best place to rent a good 'porno movie'?" Further, Gebeaux stated to plaintiff that "I'm so sexually frustrated around you, I've a 'good might' to get you fired;" that "I like married women better. Take them home; take them to bed; and let them go;" that "[w]e could all go down to the beach and have a big orgy;" and that "[i]t turns me on when you wear your hair down like that."

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

Further, the affidavit of plaintiff's clinical psychologist stated, *inter alia*, that plaintiff experienced "severe, extreme and disabling" emotional distress as a result of Gebeaux's conduct, and that her prognosis was "guarded at best and may be poor if she does not receive appropriate evaluation and treatment including psychotherapy."

Gebeaux's evidence, consisting in part of categorical denials and in part of depicting plaintiff as initiator of conversations connoting a sexual context and of personal contact with Gebeaux, conflicted with that presented by plaintiff. However, the acts and statements of Gebeaux outlined above, in addition to numerous others found in the record, without question constitute conduct which "may reasonably be regarded," *Hogan*, 79 N.C. App. at 491, 340 S.E.2d at 121, to "exceed[] all bounds of decency tolerated by society," *West*, 321 N.C. at 704, 365 S.E.2d at 625, thereby placing the question of his liability in the hands of the jury. *Hogan*, 79 N.C. App. at 491, 340 S.E.2d at 121.

As the evidentiary materials before the trial court reflect plaintiff met her burden of production regarding the individual liability of Gebeaux, we proceed to examine whether the trial court properly allowed the summary judgment motion of Gebeaux's employer, defendant WCES.

An employer may be held liable for the torts of an employee under the doctrine of *respondeat superior* in circumstances where: (1) the employer expressly authorizes the employee's act; (2) the tort is committed by the employee in the scope of employment and in furtherance of the employer's business; or (3) the employer ratifies the employee's tortious conduct. *Stanley v. Brooks*, 112 N.C. App. 609, 613, 436 S.E.2d 272, 274 (1993), *disc. review denied*, 335 N.C. 772, 442 S.E.2d 521 (1994). For plaintiff to have survived summary judgment as to WCES, therefore, the evidence must necessarily have tended to show that the acts of Gebeaux and the conduct of WCES "f[e]ll into one of the aforementioned categories." *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 436, 378 S.E.2d 232, 235, *disc. review allowed*, 325 N.C. 270, 384 S.E.2d 513, *cert. allowed*, 325 N.C. 704, 387 S.E.2d 55 (1989), *review dismissed as improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990). We conclude plaintiff presented a sufficient forecast of the evidence to move forward on the theory of ratification, and thus do not discuss the remaining categories.

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

This Court has held that:

In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act.

Hogan, 79 N.C. App. at 492, 340 S.E.2d at 122.

In addition,

“[t]he jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts.” Such course of conduct may involve an omission to act.

Brown, 93 N.C. App. at 437, 378 S.E.2d at 236 (quoting *Equipment Co. v. Anders*, 265 N.C. 393, 401, 144 S.E.2d 252, 258 (1965)).

Finally, although the employer must have knowledge of all material facts relative to its employee's acts in order to effect ratification,

[i]f the purported principal is shown to have knowledge of facts which would lead a person of ordinary prudence to investigate further, and he fails to make such investigation, his affirmance without qualification is evidence that he is willing to ratify upon the knowledge which he has.

Restatement (Second) of Agency § 91, Comment e, p. 235 (1958). See also *Equipment Co.*, 265 N.C. at 401, 144 S.E.2d at 258 (“[W]hen [principal] has such information that a person of ordinary intelligence would infer the existence of the facts in question, the triers of fact ordinarily would find that he had knowledge of such fact.” (citing Restatement (Second) of Agency, § 91, Comment c, p. 232 (1958))).

Unrefuted evidence in the record indicates WCES received letters from plaintiff and Susan White, a reporter for the newspaper, in mid-February 1993 informing it that Gebeaux had been making sexual advances towards plaintiff. White included in a lengthy, detailed letter to WCES the following:

I have heard [Gebeaux] make numerous comments to Juli, with respect to the clothes she might be wearing that day, her hair and just her overall looks, comments which I, as well as others who have heard them, believe to be stepping over the line and considered as sexual harassment.

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

Since I began working with Mr. Gebeaux, I immediately noticed his attraction to Juli. The attraction became even clearer after hearing him make comments to her such as "Um, you look good today," and "It turns me on when you wear your hair down like that."

Plaintiff wrote to WCES:

Monday, February 1st Howard made the comment to me "I am so sexually frustrated by you I think I am going to get you fired." This has not been the first time these remarks have been made . . . however, I do not want to be involved in ANY problems such as this. I will admit it has **greatly** affected my job performance.

(emphasis in the original).

WCES points to a second letter received from plaintiff, shortly after receipt of the first, in which she praised efforts of WCES in helping to resolve her problems with Gebeaux. Admittedly, plaintiff's evidence may fairly be characterized as containing contradictions on the question of whether any representative of WCES was explicitly informed that Gebeaux's sexual harassment of plaintiff continued after the February letter. However, plaintiff's affidavit also suggests Johnson failed to take the allegations set out in the first letter seriously. Plaintiff relates that Johnson said, upon patting her on the shoulder during a meeting soon after WCES received the first letter, "Now, Juli, this is not sexual harassment."

At the same meeting, according to plaintiff,

I told W. A. Johnson and Rebecca Johnson Davidson of some of the things Howard Gebeaux had said to me, including "It turns me on when you wear your hair down," but was interrupted by W. A. Johnson stating that was in the past and we must go on. W. A. Johnson would not allow me to continue to tell him about further acts of sexual harassment.

In addition, plaintiff maintains in her affidavit that:

In early April of 1993, W. A. Johnson saw flowers in my office . . . and asked who sent them. I replied, "Howard did. He's still up to his same old tricks."

. . . .

DENNING-BOYLES v. WCES, INC.

[123 N.C. App. 409 (1996)]

In late April of 1993, I met with Rebecca Davidson, tried to discuss sexual harassment by Howard Gebeaux, but she told me we would not discuss Mr. Gebeaux unless Howard Gebeaux was present.

Moreover, plaintiff asserts that on 4 June 1993, when she and four other female employees of the newspaper went to Johnson's office to protest the behavior of Gebeaux, plaintiff told Johnson three times that she could "no longer work with sexual harassment from Howard Gebeaux." Plaintiff claims that after briefly hearing from the employees, Johnson told them to return to the newspaper office to await his decision on whether Gebeaux would be fired. Johnson then called Gebeaux to his office; following a discussion with Gebeaux, Johnson went to the newspaper office where he announced to the staff that Gebeaux would be staying on as editor. Johnson informed plaintiff that WCES would like her and one other employee who had protested to remain with the paper. Plaintiff alleges she said at that point, "I will no longer stay and work with sexual and mental harassment." According to plaintiff, Johnson responded, "Gather your things and be out of the office before five o'clock."

WCES maintains it at no time received sufficient knowledge of material facts regarding Gebeaux's sexual harassment of plaintiff so as to satisfy the first element of ratification. *See Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122 ("it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act"). However, we believe plaintiff presented a sufficient forecast of evidence upon which a jury could find that WCES learned of facts regarding Gebeaux's sexual harassment of plaintiff which would have led a reasonable person "to investigate further," Restatement (Second) of Agency, *supra*, at p. 235, and that its failure to do so showed WCES was "willing to ratify upon the knowledge which [it had]." *Id.*

Further, a jury could find the requisite element of intent on the part of WCES to ratify Gebeaux's actions through its "words [and] conduct," *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122, in declining to hear complaints from plaintiff or intervene on her behalf, or in retaining Gebeaux in the face of plaintiff's insistence she could "no longer work with sexual harassment from Howard Gebeaux." *See Hogan*, 79 N.C. App. at 492-93, 340 S.E.2d at 122 (whether manager's actions consisting, *inter alia*, of "retaining [harasser] in defendant's employ, [and] declining to intervene to prevent his further offensive

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

behavior toward [plaintiff]" amounted to "a course of conduct signifying an intention to . . . ratify [harasser's] acts is a question for the jury").

[2] Finally, we briefly examine plaintiff's contention the trial court erred by refusing to permit amendment of her complaint under N.C.R. Civ. P. 15(a) in order to add Johnson as defendant. Denial of a motion to amend ordinarily is not reviewable in the absence of a clear showing of abuse of discretion. *Caldwell's Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 731, 340 S.E.2d 518, 519 (1986). In the case *sub judice*, the trial court's order contained the factual findings that (1) "if William A. Johnson had any liability to the plaintiff, such fact was obvious to the plaintiff as early as February of 1993, and this action was instituted without making him a party," and (2) adding Johnson would make further discovery necessary at a point in the case where discovery was almost complete, thereby causing undue delay of the trial. We find no abuse of discretion in the court's order.

In sum, the trial court's award of summary judgment in favor of WCES on the issues of intentional infliction of emotional distress and punitive damages, *see Brown*, 93 N.C. App. at 438, 378 S.E.2d at 236-37 ("existence of an outrageous act supports submission of an issue pertaining to punitive damages to the jury"), is reversed; the order denying plaintiff's motion to amend her complaint is affirmed.

Reversed in part; affirmed in part.

Judges EAGLES and LEWIS concur.

HARRY VASSEUR, PLAINTIFF v. ST. PAUL MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA95-458

(Filed 6 August 1996)

1. Insurance § 533 (NCI4th)— rejection of UIM coverage— requirements not met—UIM coverage provided

Since restriction of UIM coverage only to certain of the autos covered under a policy necessarily involves "rejection" of UIM coverage for those autos afforded liability coverage but not UIM

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

coverage, the “rejection” must therefore comply with the mandates of N.C.G.S. § 20-279.21(b)(4), and because plaintiff’s employer executed no rejection form in accordance with the statute, and thus did not validly reject UIM coverage for “nonowned autos,” plaintiff’s employer’s policy with defendant therefore provided \$1,000,000 UIM coverage for such autos.

Am Jur 2d, Automobile Insurance §§ 304 et seq.

Construction of statutory provision governing rejection or waiver of uninsured motorist coverage. 55 ALR3d 216.

“Excess” or “Umbrella” insurance policy as providing coverage for accidents with uninsured or underinsured motorists. 2 ALR5th 922.

2. Insurance § 528 (NCI4th)— motorcycle operated in course of employer’s business—employee entitled to UIM coverage

A motorcycle owned and operated by plaintiff in the course and conduct of his employer’s business at the time of the collision was an “insured vehicle” under the terms of the employer’s policy with defendant, and plaintiff, a class two insured, was therefore a “person insured” for “UIM purposes” and entitled to UIM coverage under the policy in the amount of \$1,000,000.

Am Jur 2d, Automobile Insurance § 315.

What constitutes “Automobile” for purposes of uninsured motorist provisions. 65 ALR3d 851.

Uninsured motorist insurance: Injuries to motocyclist as within affirmative or exclusionary terms of automobile insurance policy. 46 ALR4th 771.

Appeal by plaintiff from judgment entered 28 February 1995 by Judge Chase B. Sanders in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 January 1996.

DeVore & Acton, P.A., by Fred W. DeVore, III, for plaintiff-appellant.

Kurdys & Lovejoy, by Scott C. Lovejoy and Jeffrey S. Bolster, for defendant-appellee.

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

JOHN, Judge.

In this declaratory judgment action, plaintiff appeals the trial court's determination that plaintiff was not afforded underinsured motorist coverage by a policy of insurance issued by defendant. We reverse the trial court.

The following pertinent facts and procedural information are undisputed: At all relevant times, plaintiff was an employee of Mountain Air Cargo (Mountain Air), the named insured in a policy issued by defendant. On 19 April 1993, plaintiff's motorcycle was struck by an automobile operated by an underinsured motorist while plaintiff was delivering materials to his supervisor within the course and scope of his employment. Plaintiff was severely injured in the collision, incurring medical bills and lost earnings of approximately \$300,000, and sustaining significant permanent disability.

Plaintiff exhausted the underinsured motorist's liability coverage of \$100,000, and subsequently made a claim for underinsured motorist (UIM) coverage under Mountain Air's policy with defendant (the policy). Following defendant's denial of his claim, plaintiff filed the instant action seeking a declaratory judgment that he was entitled to UIM coverage under the policy.

On 28 February 1995, the trial court determined that "the defendant St. Paul Mutual Insurance Company affords no underinsured motorist coverage for the benefit of plaintiff," and directed that "judgment [be] entered in favor of defendant." Plaintiff appeals.

Plaintiff contends that because Mountain Air, the named insured within the policy, did not properly reject UIM coverage, such coverage was automatically written into the policy in the same amount as the liability limits of \$1,000,000. We agree.

In determining whether insurance coverage is provided by a particular policy, careful attention must be given to (1) the type of coverage, (2) the relevant statutory provisions, and (3) the terms of the policy. *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

In the case *sub judice*, the type of coverage at issue is UIM, and therefore the governing statute is the version of N.C. Gen. Stat. § 20-279.21(b)(4) in effect at the time the policy was issued. *See White v. Mote*, 270 N.C. 544, 555, 155 S.E.2d 75, 82 (1967) ("Laws in effect

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

at the time of issuance of a policy of insurance become a part of the contract”) Further,

[w]hen a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy, as if written into it. If the terms of the statute and the policy conflict, the statute prevails.

Isenhour v. Universal Underwriters Ins. Co., 341 N.C. 597, 605, 461 S.E.2d 317, 322, *reh’g denied*, 342 N.C. 197, 463 S.E.2d 237 (1995) (citations omitted).

It is undisputed that the applicable version of G.S. § 20-279.21(b)(4) provided as follows:

(b) Such owner’s policy of liability insurance:

. . . .

(4) Shall . . . provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) [i.e. \$25,000/\$50,000] of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars (\$1,000,000) as selected by the policy owner.

. . . .

The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision.

. . . .

Rejection of this coverage for policies issued after October 1, 1986, shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

G.S. § 20-279.21(b)(4) (1991).

The Financial Responsibility Act (the Act), which includes G.S. § 20-279.21(b)(4), is “a remedial statute which must be liberally construed in order to achieve the ‘beneficial purpose intended by its

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

enactment.' " *Hendrickson v. Lee*, 119 N.C. App. 444, 449, 459 S.E.2d 275, 278 (1995) (citing *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989) (citation omitted)). "[P]rotection of innocent victims who may be injured by financially irresponsible motorists" has consistently been held to be the purpose of the Act, which purpose is "best served when the statute is interpreted to provide the innocent victim with the fullest possible protection." *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 224-25, 376 S.E.2d 761, 763-64 (1989) (citations omitted).

Turning to the policy language, see *Smith*, 328 N.C. at 142, 400 S.E.2d at 47, we note it provides \$1,000,000 *liability coverage* for "Any Auto," the broadest category set out under the subheading "Covered Autos," which itself is contained within the subsection "Auto Liability Protection." "Auto" is defined in the general policy provisions, see *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng. Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990) ("[w]here a policy defines a term, that definition is to be used"), as "any land motor vehicle . . . designed for travel on public streets or roads." "Any auto," is "any owned, rented, leased or borrowed auto. It includes hired, *nonowned*, newly acquired, replacement and temporary substitute autos." (Emphasis added.) A "Nonowned Auto[]" is

any auto that: you don't own, hire, rent, lease or borrow, and . . . used in the conduct of your business. It includes autos owned by your employees or partners or members of their households. But only while such autos are being used in the conduct of your business.

However, *UIM coverage* under the policy is restricted to "any owned auto," not specifically defined within the general policy definitions, but otherwise referred to in the policy as "any auto that you own." "You" is defined as "the named insured," which includes, *inter alia*, plaintiff's employer Mountain Air, but not plaintiff. Plaintiff argues persuasively that "[defendant] cannot limit underinsurance coverage to only 'owned autos' if its policy provides liability coverage for 'any auto' used by the insured, unless it does so pursuant to G.S. § 20-279.21(b)(4)."

In *Hendrickson*, this Court strictly enforced the requirement that UIM coverage may be rejected only " 'in writing . . . on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance,' " *Hendrickson*, 119 N.C. App. at 450, 459

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

S.E.2d at 279, in order to “assure compensation for the innocent victims of uninsured or underinsured drivers”—the primary purpose of the Act. *Id.* at 457, 459 S.E.2d at 283.

In the case *sub judice*, Mountain Air executed no rejection form promulgated by the Rate Bureau and approved by the Commissioner nor any form whatsoever. Notwithstanding, defendant insists that “[Mountain Air’s] selection of ‘owned autos’ for purposes of UIM coverage comports with the mandates of the Financial Responsibility Act.” According to defendant, G.S. § 20-279.21(b)(4) “requires that each automobile insurance policy issued in North Carolina have UIM coverage in the same *amount* found in the personal injury liability coverage,” but that it contains no requirement that the “*scope*” of the policy be identical. Therefore, defendant concludes, an insurer may restrict UIM coverage only to certain automobiles covered under a policy’s liability provisions without receiving the statutorily-required rejection of UIM insurance. This argument fails.

[1] Restriction of UIM coverage only to certain of the autos covered under a policy necessarily involves “rejection” of UIM coverage for those autos afforded liability coverage but not UIM coverage. This “rejection” must therefore comply with the mandates of G.S. § 20-279.21(b)(4). Mountain Air executed no rejection form in accordance with G.S. § 20-279.21(b)(4), and thus did not validly reject UIM coverage for “nonowned autos.” *See Hendrickson*, 119 N.C. App. at 450, 459 S.E.2d at 279. Mountain Air’s policy with defendant therefore provided \$1,000,000 UIM coverage upon such autos.

[2] We next consider whether plaintiff may avail himself of this coverage. In *Smith*, 328 N.C. at 143, 400 S.E.2d at 47, our Supreme Court reiterated that under G.S. § 20-279.21(b)(3) and (b)(4), there are two classes of “persons insured:”

- (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and
- (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and guest in such vehicle.

Class one insureds are covered for purposes of UIM coverage “regardless of whether the insured vehicle is involved in their injuries.” However, class two insureds are “‘persons insured’ only when the insured vehicle is involved in the insured’s injuries.” *Isenhour*, 341 N.C. at 606, 461 S.E.2d at 322 (citing *Smith*, 328 N.C. at 143, 400

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

S.E.2d at 47). Indeed, defendant does not dispute that plaintiff should be considered a class two insured if he was “injured while occupying a motor vehicle to which the [p]olicy applied.”

As pointed out above, “auto” is defined in the policy as “any land motor vehicle . . . designed for travel on public streets or roads.” Defendant makes no argument that plaintiff’s motorcycle was not an “auto.” The policy definition of “any autos” includes “nonowned autos,” which further include “autos owned by [the named insured’s] employees . . . [b]ut only while such auto are being used in the conduct of [the named insured’s] business.” Defendant concedes plaintiff owned the motorcycle involved in the instant collision, and further that plaintiff’s vehicle was “being used in the conduct of [the named insured’s] business.”

Accordingly, the motorcycle owned and operated by plaintiff at the time of the collision was an “insured vehicle” under the policy. Plaintiff, a class two insured, was therefore a “person insured” for “UIM purposes,” *see Smith*, 328 N.C. at 143, 400 S.E.2d at 47, and *Isehour*, 341 N.C. at 606, 461 S.E.2d at 322, and entitled to UIM coverage under the policy in the amount of \$1,000,000.

Notwithstanding, defendant maintains that *Smith*, 328 N.C. 139, 400 S.E.2d 44, and *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991), mandate a ruling to the contrary. This argument is unfounded.

The policy of insurance in *Smith* provided more extensive UIM coverage than liability coverage. *Smith*, 328 N.C. at 144-45, 400 S.E.2d at 48. Our Supreme Court emphasized that

the very nature of liability insurance coverage is different from UM/UIM insurance coverage. The former protects covered persons from the consequences of their own negligence; the latter protects covered persons from the consequences of the negligence of others.

Id. at 146, 400 S.E.2d at 49. Therefore, the court concluded,

while the statutory scheme requires the insurance company to offer UM/UIM coverages only if liability coverages exceed the minimum statutory requirement and in an *amount* equal to the limits of bodily injury liability insurance, nothing in the statute requires that the *scope* of coverage be the same.

Id. at 148, 400 S.E.2d at 50 (emphasis in original).

VASSEUR v. ST. PAUL MUTUAL INS. CO.

[123 N.C. App. 418 (1996)]

We do not quarrel with defendant's statement that "[t]he Supreme Court [in *Smith*] indicated that disparate treatment of the Liability and UIM provisions is entirely permissible and in fact comports with the distinctions found in the statutory authorization for these coverages." Defendant also properly cites *Sproles*, 329 N.C. at 610, 407 S.E.2d at 501, wherein our Supreme Court upheld an "owned autos only" policy restriction, identical to the one *sub judice*, which narrowed the scope of protection afforded by the policy's UIM coverage to class two insureds.

Nevertheless, defendant's reliance upon these cases is misplaced. Significantly, issuance of the policies in both *Smith*, 328 N.C. at 141, 400 S.E.2d at 46, and *Sproles*, 329 N.C. at 606, 407 S.E.2d at 498-99, took place at a time when earlier versions of G.S. § 20-279.21(b)(4) were in effect. These versions permitted rejection of UIM coverage, but failed to specify a particular method of rejection. (See G.S. § 20-279.21(b)(4) (1983) and (1985), providing merely that "[t]he coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage.")

In 1986, the statute was amended to provide, *inter alia*,

[r]ejection of this coverage for policies issued after October 1, 1986 shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

Maryland Casualty Co. v. Smith, 117 N.C. App. 593, 594, 452 S.E.2d 318, 319, *disc. review denied*, 340 N.C. 114, 456 S.E.2d 316 (1995). See also 1985 N.C. Sess. Laws (Reg. Sess. 1986) ch. 1027. Indeed, the version of G.S. § 20-279.21(b)(4) in effect 1 August 1992, issuance date of the instant policy, specifically mandated that rejection of or selection of different limits for UIM coverage "shall be made in writing . . . on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance." G.S. § 20-279.21(b)(4) (1991) (emphasis added); see also *Watson v. American National Fire Insurance Co.*, 106 N.C. App. 681, 683-84, 417 S.E.2d 814, 816 (1992), *aff'd*, 333 N.C. 338, 425 S.E.2d 696 (1993) ("if the plaintiff had rejected the automatic UIM coverage, he could only have done so as stipulated in N.C.G.S. § 20-279.21(b)(4) [1991]."). As noted above, we must apply the version of G.S. § 20-279.21(b)(4) in effect at the time the policy was issued. See *White*, 270 N.C. at 555, 155 S.E.2d at 82.

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

Our holding should not be construed to invalidate the “disparate treatment” of liability and UIM coverage allowed by our Supreme Court in *Smith*, which “[s]ince *Smith*, . . . has made even broader statements about the extent of UIM coverage.” *Nationwide Mutual Ins. Co. v. Mabe*, 115 N.C. App. 193, 205, 444 S.E.2d 664, 671 (1994), *aff’d*, 342 N.C. 482, 467 S.E.2d 34 (1996) (“an owned vehicle exclusion [applicable to first class insureds] is contrary to the terms of N.C.G.S. § 20-279.21(b)(4), whether it is judicially imposed or whether it is contained in the UIM portion of the policy.”). Equally erroneous would be to view our holding as proscribing the applicability of “owned autos only” clauses to class two insureds approved by *Sproles*. Instead, we simply interpret the mandate of G.S. § 20-279.21(b)(4) to be precisely what the statutory language provides, *i.e.*, that “rejection of or selection of different coverage limits for underinsured motorist coverage . . . shall be *in writing*” on the form approved by the Commissioner of Insurance. See *Hendrickson*, 119 N.C. App. at 450-51, 459 S.E.2d at 279 (emphasis added); and *Watson*, 106 N.C. App. at 683-84, 417 S.E.2d at 816 (1992).

For the reasons stated above, the decision of the trial court is reversed.

Reversed.

Judges JOHNSON and SMITH concur.

GEORGIA RAY ANDERSON v. JULIUS RUBIN HOLLIFIELD

No. COA95-1178

(Filed 6 August 1996)

1. Damages § 178 (NCI4th)— jury award of \$1.00 in damages—verdict less than proven medical expenses—error

The jury’s award of one dollar in damages to plaintiff upon finding negligence by defendant in a rear-end collision will not be set aside on the ground that it was against the greater weight of the evidence on the issue of whether the accident aggravated plaintiff’s preexisting degenerative disk disease because testimony on this issue by plaintiff’s treating physician was inconclusive and presented a question of fact for the jury. However, the

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

one dollar award must be set aside where it was undisputed that defendant's negligence caused plaintiff to suffer an acute cervical sprain, plaintiff made a number of visits to her treating physician for treatment of the cervical sprain alone, and the award was less than the amount of expenses plaintiff proved she incurred for treatment of her cervical sprain.

Am Jur 2d, Damages §§ 1017 et seq.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases. 5 ALR5th 875.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases. 12 ALR5th 195.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death. 14 ALR5th 242.

2. Evidence and Witnesses §§ 148, 254 (NCI4th)— personal injury action—evidence of workers' compensation benefits admissible—evidence of liability insurance coverage inadmissible

N.C.G.S. § 97-10.2(e) specifically provides for the introduction of evidence of workers' compensation benefits received but provides no corresponding right on the part of the plaintiff to introduce evidence of defendant's liability insurance coverage.

Am Jur 2d, Evidence §§ 483-492; Workers' Compensation § 474.

Admissibility of evidence, and propriety and effect of questions, statements comments, etc., tending to show that defendant in personal injury or death action carries liability insurance. 4 ALR2d 761.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability. 47 ALR3d 234.

Judge SMITH dissenting.

Appeal by plaintiff from judgment entered 27 February 1995 by Judge Raymond A. Warren in Gaston County Superior Court. Heard in the Court of Appeals 5 June 1996.

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

On 18 December 1992, plaintiff Georgia Ray Anderson, driving her unmarked police vehicle on Franklin Boulevard, stopped at the intersection of Franklin Boulevard and South Chester Street in Gastonia, North Carolina. Defendant, Julius R. Hollifield, was operating a 1968 Ford pickup truck directly behind the vehicle driven by plaintiff. As plaintiff stopped at the intersection, defendant failed to stop in time and collided with the rear of plaintiff's vehicle. Photographs taken at the scene revealed no visible damage to either vehicle and neither driver appeared to be seriously injured at that time.

As of 18 December 1992, plaintiff was employed by the Gastonia City Police Department and was within the course and scope of her employment when the traffic accident occurred. Plaintiff's injuries were covered by workers' compensation insurance from which plaintiff received approximately \$32,423.94 in workers' compensation benefits. Defendant introduced evidence of the workers' compensation insurance and benefits paid at trial pursuant to G.S. 97-10.2(e).

At the close of trial on 13 February 1995, the trial court submitted two questions to the jury and received the following answers from the members of the jury:

1. Did the negligence of the Defendant, Julius Rubin Hollifield, cause injury to the Plaintiff, Georgia Ray Anderson?

ANSWER: Yes.

2. What amount is the Plaintiff, Georgia Ray Anderson, entitled to recover for personal injuries?

ANSWER: \$1.00.

Plaintiff moved to set aside the verdict as to issue two on the grounds that it was against the greater weight of the evidence. The trial court denied plaintiff's motion and entered judgment in accordance with the jury's verdict on 27 February 1995.

Plaintiff appeals.

James R. Carpenter and Larry G. Hoyle for plaintiff-appellant.

Colombo & Robinson, by William C. Robinson, for defendant-appellee.

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

EAGLES, Judge.

We note first that there are numerous rule violations by plaintiff in this case. In our discretion, however, “we treat the purported appeal as a petition for writ of certiorari and pass upon the merits of the questions raised.” *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985) (citing N.C. R. App. P. 21 (1988)).

[1] Plaintiff first argues that the trial court erred in failing to set aside the jury’s verdict on issue number two as against the greater weight of the evidence. We agree. Denial of a motion to set aside the verdict is within the trial court’s discretion and will not be reversed absent an abuse of that discretion. *State v. Peterson*, 337 N.C. 384, 397, 446 S.E.2d 43, 51 (1994).

Plaintiff’s treating physician here, Dr. Robert Blake, identified two medical problems with plaintiff’s neck: (1) An acute cervical sprain stemming directly from the impact, and (2) a degenerative disk disease including related bone spurring. Dr. Blake testified that the degenerative disk and bone spurring conditions were clearly pre-existing at the time of the accident. Since it is undisputed that the accident caused plaintiff to suffer at least an acute cervical sprain, the first question is whether the accident aggravated the degenerative disk condition so that defendant should also be liable for the pain, suffering and medical expenses associated with treating that condition as well.

On this issue, Dr. Blake’s testimony as a whole is inconclusive and clearly presents questions of fact for resolution by the jury. Defendant seizes on Dr. Blake’s testimony that the post-accident x-ray revealed no visible damage to the vertebrae, disk or spinal cord that could be attributed to the accident. Dr. Blake admitted that the natural progression of plaintiff’s condition could have caused plaintiff’s symptoms to first appear when plaintiff first reported them to Dr. Blake, just over seven weeks after the date of the accident. Moreover, Dr. Blake testified that the results of an MRI test performed over seven weeks after the accident indicated that some progression had occurred since the accident and that it was as a result of this progression that surgery was necessary.

In support of plaintiff’s position, Dr. Blake testified that it is “pretty common” for a trauma like the accident here to aggravate a pre-existing condition like plaintiff’s thereby causing progression to occur and causing symptoms to first manifest themselves. Dr. Blake

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

testified that this sequence of events could also explain the timing of the first recorded appearance of plaintiff's symptoms seven weeks after the accident. Furthermore, Dr. Blake stated that trauma caused by the accident could initiate further and accelerated degeneration, as plaintiff contends it must have here.

In reviewing the trial court's ruling, we recognize that the jury's role in our system is specifically to resolve questions of fact and assess the credibility of witnesses. The jury's role is exclusive in this regard and may not be infringed by the trial judge or by this Court. *Booher v. Frue*, 98 N.C. App. 570, 577-78, 394 S.E.2d 816, 819-20, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). Here, in awarding damages of only one dollar, the jury apparently determined that the accident did not aggravate plaintiff's pre-existing condition, and therefore that any pain, suffering and medical expenses associated with the progression of that pre-existing condition were not "harm" to the plaintiff caused by defendant's actions. *See Chiltoski v. Drum*, 121 N.C. App. 161, 163-64, 464 S.E.2d 701, 703 (1995), *disc. review denied*, 343 N.C. 121, 468 S.E.2d 777 (1996). While this result may not accord with the sympathies in this case, because the power to make this determination is clearly within the province of the jury, we do not disturb the jury's verdict on this basis.

We must reverse the trial court's ruling and overturn the jury's verdict, however, because it is undisputed that plaintiff made a number of visits to Dr. Blake for treatment of the symptoms of her neck sprain alone. Plaintiff made those visits after the collision but well before symptoms of her other condition reportedly manifested themselves for the first time. On those visits, plaintiff incurred medical expenses, and plaintiff must be compensated for those costs based on the jury's previous and unchallenged finding that plaintiff was harmed by defendant's negligence. Defendant does not dispute that his negligence caused the acute cervical sprain suffered by plaintiff. Accordingly, we conclude that it was error to permit the jury to award plaintiff damages in any amount less than the amount of expenses she proved she incurred in being treated for her acute cervical sprain.

[2] Plaintiff next argues that evidence of defendant's liability insurance coverage should have been introduced since evidence of plaintiff's recovery in workers' compensation was introduced pursuant to G.S. 97-10.2(e). We disagree.

G.S. 97-10.2(e) governs the introduction of evidence concerning recovery under the workers' compensation statutes and provides in

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

pertinent part that "[t]he amount of compensation . . . paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party." G.S. 97-10.2(e) (1991). This statute specifically provides for the introduction of evidence of workers' compensation benefits received, but provides no corresponding right on the part of the plaintiff to introduce evidence of defendant's liability insurance coverage. The General Assembly enacted G.S. 97-10.2(e) with full opportunity to be aware of the longstanding prohibition against the introduction of evidence as to defendant's liability insurance coverage. *E.g.*, *Scallion v. Hooper*, 58 N.C. App. 551, 556-57, 293 S.E.2d 843, 845-46, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982). In 1983, the General Assembly essentially codified the common law regarding the admissibility of liability insurance by enacting G.S. 8C-1, Rule 411. This Court is not a legislative body and may not legislate to amend or repeal the enactments of our General Assembly. Plaintiff's argument would in effect require us to amend G.S. 97-10.2(e) and G.S. 8C-1, Rule 411 to strike down the prohibition against the admission of liability insurance evidence in this context. We decline and accordingly conclude that the trial court properly granted defendant's motion in limine prohibiting the introduction of evidence of defendant's liability insurance coverage.

The order of the trial court is reversed and the cause is remanded for a new hearing on the issue of damages. The only damages that may be considered on remand are those related solely to plaintiff's acute cervical sprain. We need not address plaintiff's remaining assignment of error.

Reversed and remanded.

Judge WYNN concurs.

Judge SMITH dissents.

Judge SMITH dissenting.

I dissent from the majority opinion which reaches the merits of this purported appeal. As the majority acknowledges, plaintiff has made numerous rule violations in the instant case. Specifically, judgment was signed on 27 February 1995 and filed on 1 March 1995. The only document that might possibly be construed as a notice of appeal is captioned "APPEAL ENTRIES." That document is dated and filed on 12 May 1995. Appellate Rule 3 requires that written notice of

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

appeal in civil actions be served and filed within 30 days of the entry of judgment. N.C.R. App. P. 3 (1995). "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *appeal dismissed and disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990) (citation omitted).

The record on appeal was served on appellee on 12 May 1995 and filed with this Court on 23 October 1995. Appellate Rule 11(b) provides in pertinent part that the record on appeal becomes settled 21 days after service if no "objections, amendments or a proposed alternative record" are served. N.C.R. App. P. 11(b). Thereafter, an appellant has 15 days to file the record on appeal. N.C.R. App. P. 12(a). The record on appeal does not disclose that any objections, exceptions or a proposed alternative record on appeal were served or that any extension of time to file the record on appeal was granted pursuant to Appellate Rule 11(f).

Suspension of the appellate rules pursuant to our discretionary power under N.C.R. App. P. 2 may not be used in this case to address the merits of plaintiff's appeal. As this Court has held that "[w]ithout proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994) (citing *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990) and *Brooks, Comm'r of Labor v. Gooden*, 69 N.C. App. 701, 318 S.E.2d 348 (1984), *disc. review denied*, 339 N.C. 609, 454 S.E.2d 246, *aff'd*, 341 N.C. 702, 462 S.E.2d 219, *reh'g denied*, 342 N.C. 418, 465 S.E.2d 536 (1995)).

A petition for certiorari has not been submitted as part of this appeal. Appellate Rule 21(b) requires a party seeking review by writ of certiorari to file a petition therefor with the clerk of court. N.C.R. App. P. 12(b). I do not believe the majority can properly treat this appeal as a petition for certiorari because in order to do so, the majority must suspend the appellate rules pursuant to Rul 2. Because this Court does not have jurisdiction of this appeal, it may not use Rule 2 to suspend the appellate rules, grant certiorari, and then address the merits of the appeal.

Even if the Court could properly grant certiorari in this case, I believe the majority improperly exercised its discretion in granting the purported petition. A writ of certiorari is an extraordinary reme-

ANDERSON v. HOLLIFIELD

[123 N.C. App. 426 (1996)]

dial writ which, in certain instances, may lie as a substitute for an appeal. Its object is to prevent an improper deprivation of appeal. *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 22 S.E.2d 896 (1942). In the instant case, plaintiff flagrantly violated the appellate rules, and I do not believe she will be improperly deprived of an appeal by dismissing this case for such violations.

In a case similar to the instant case, our Supreme Court, in a *per curiam* opinion, granted certiorari to review our dismissal of an appeal for rule violations and affirmed. *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983). In the case *sub judice* and in *Booth*, no notices of appeal were filed. However, in each case documents entitled "appeal entries" were filed. (In *Booth*, the entries were filed the day after entry of judgment which would have been timely for a notice of appeal. In the case at bar, they were filed on 12 May 1995 which would not have been timely for a notice of appeal.) In each case, the "appeal entries" were served on the appellees as part of the proposed record on appeal only. It is my opinion that the facts of the present case are substantially identical to the facts of *Booth*. If anything, the violations in *Booth* were less egregious than in this case because the "appeal entries" in *Booth* were filed within the time provided for giving notice of appeal.

Furthermore, in the instant case, the jury was presented with all relevant evidence and returned a verdict in favor of plaintiff for one dollar. The record indicates that the jury heard all of the evidence regarding damages. The jury was properly instructed on the weight to be given to the evidence presented and that plaintiff had the burden of proving defendant's negligence proximately caused her injury and the specific amount of damages resulting from those injuries. See *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995). It is obvious to me that the jury's verdict is a determination that plaintiff had not carried her burden of proof on these issues. Therefore, I believe the majority invades the province of the jury in its opinion setting aside the jury's verdict. There was no need to grant certiorari in this case.

For these reasons, I would dismiss this purported appeal for the appellate rule violations and do not believe this Court can treat the appeal as a petition for certiorari pursuant to our authority under N.C. Gen. Stat. § 7A-32(c) (1995) and Appellate Rule 2.

IN RE OGHENEKEVEBE

[123 N.C. App. 434 (1996)]

IN THE MATTER OF ISAAC OGHENEKEVEBE, MINOR CHILD

No. COA95-1186

(Filed 6 August 1996)

1. Parent and Child § 117 (NCI4th)— termination of parental rights—effective assistance of counsel

In a proceeding for termination of parental rights, respondent was not denied her right to effective assistance of counsel since failure of counsel to obtain a pretrial hearing did not prejudice respondent in that she was already on notice as to the issues at hand; counsel's failure to move for dismissal at the end of DSS's evidence was not prejudicial, as the evidence presented pursuant to N.C.G.S. § 7A-289.32(3) was sufficient to withstand a motion to dismiss; counsel's failure to object to allegedly inadmissible and prejudicial testimony and introduction of testimony and exhibits which were allegedly potentially harmful to respondent's case did not prejudice respondent, as it was presumed that the trial court disregarded any incompetent evidence; and the attorney's unsuccessful argument that termination was not in the best interests of the child was not equivalent to ineffective assistance.

Am Jur 2d, Parent and Child § 7.**2. Parent and Child § 126 (NCI4th)— termination of parental rights—sufficiency of evidence**

The evidence was sufficient to support the trial court's findings of fact which in turn were sufficient to support its conclusion that respondent's parental rights should be terminated where the evidence tended to show that respondent left her minor child in foster care for over twelve months without showing reasonable progress or a positive response toward the diligent efforts of DSS. N.C.G.S. § 7A-289.32(3).

Am Jur 2d, Parent and Child § 7.**Admissibility of social worker's expert testimony on child custody issues. 1 ALR4th 837.**

Appeal by respondent from judgment filed 4 May 1995 by Judge Deborah M. Burgin in Henderson County District Court. Heard in the Court of Appeals on 5 June 1996.

IN RE OGHENEKEVEBE

[123 N.C. App. 434 (1996)]

Charles Russell Burrell for petitioner appellee.

Coleman Law Offices, by Calvin E. Coleman and Colin P. McWhirter, for respondent appellant.

SMITH, Judge.

Minor child Isaac Oghenekevebe, born 23 September 1983, has resided in foster care in the custody of petitioner Henderson County Department of Social Services (DSS) since 10 April 1992. At the time the child came into custody of DSS, both the minor child and respondent Kathy L. Wilson (the biological mother) lived in Henderson County, North Carolina. Subsequently, respondent moved to Norfolk, Virginia, and the minor child was placed in foster care in Shelby, North Carolina.

The minor child was adjudicated a dependent juvenile on 22 May 1992. Immediately prior to the custodianship of DSS, the minor child was diagnosed as suffering from oppositional defiant disorder and was later certified as a "Willie M." class member. Since September 1992, there have been no visits between the minor child and the respondent mother. The minor child's behavior has improved since his entry into a therapeutic foster home.

Judge Burgin found that grounds existed for the termination of the biological mother's parental status since she willfully placed her minor child in foster care for more than twelve months and did not show reasonable progress in correcting the conditions which led to that placement. The trial court also determined that respondent failed to positively respond to the diligent efforts of DSS to encourage the strengthening of her parental relationship with the child or to engage in constructive planning for the child. Thus, the court held that it was in the best interests of the child to terminate respondent's parental rights.

This Court has previously recognized that a parent's interest in his or her child is "more precious than any property right." *In re Murphy*, 105 N.C. App. 651, 654, 414 S.E.2d 396, 398, *aff'd*, 332 N.C. 663, 422 S.E.2d 577 (1992). Thus, "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is a commanding one." *In re Bishop*, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989) (citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 68 L.Ed 2d 640, 650 (1981)). On review, this Court must determine whether the trial court's findings of fact were based on

IN RE OGHENEKEVEBE

[123 N.C. App. 434 (1996)]

clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur on the grounds stated in N.C. Gen. Stat. § 7A-289.32. *In re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 35 (1985). So long as the findings of fact support a conclusion based on § 7A-289.32, the order terminating parental rights must be affirmed. *In re Swisher*, 74 N.C. App. at 240, 328 S.E.2d at 35.

I. Effective Assistance of Counsel

[1] The first issue presented in this case is whether respondent received effective assistance of counsel at trial. N.C. Gen. Stat. § 7A-289.23 (1995) guarantees a parent's right to counsel in all proceedings dedicated to the termination of parental rights. Given that this right exists, it follows that a remedy must also exist to cure violations of this statutory right. If no remedy were provided a parent for inadequate representation, the statutory right to counsel would become an "empty formality." *In re Bishop*, 92 N.C. App. at 664-65, 375 S.E.2d at 678. "Therefore, the right to counsel provided by G.S. 7A-289.23 includes the right to effective assistance of counsel." *Id.* at 665, 375 S.E.2d at 678. A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing. *Id.* at 665, 375 S.E.2d at 679 (citing *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)).

Respondent's first five assignments of error relate to ineffective assistance of counsel. First, respondent argues her attorney failed to request and obtain a pretrial adjudicatory hearing pursuant to N.C. Gen. Stat. § 7A-289.29(b) (1995). In this case, the failure of counsel to obtain a pretrial hearing did not prejudice respondent. The purpose of the pretrial hearing is to determine the issues raised by the petition and answer(s). *In re Taylor*, 97 N.C. App. 57, 60, 387 S.E.2d 230, 231 (1990). The only issue raised by the petition was termination of parental rights pursuant to N.C. Gen. Stat. § 7A-289.32(3). Thus, respondent was on notice as to the issues at hand. As such, it is difficult to see how lack of a pretrial hearing deprived respondent of a fair hearing based on the termination petition.

Additionally, respondent argues her counsel failed to make a motion to dismiss at the close of petitioner's case. N.C. Gen. Stat. § 1A-1, Rule 41(b) (1990) sets the standard for a motion to dismiss in a nonjury trial. The judge becomes both the judge and jury. *In re Becker*, 111 N.C. App. 85, 92, 431 S.E.2d 820, 825 (1993). Therefore,

IN RE OGHENEKEVEBE

[123 N.C. App. 434 (1996)]

the judge must consider and weigh all competent evidence before him. *Id.* A motion for dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), made at the close of plaintiff's evidence in a nonjury trial, not only tests the sufficiency of plaintiff's proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against plaintiff, even though plaintiff may have made out a *prima facie* case. *McKnight v. Cagle*, 76 N.C. App. 59, 65, 331 S.E.2d 707, 711, *cert. denied*, 314 N.C. 541, 335 S.E.2d 20 (1985). Dismissal under this statute is left to the sound discretion of the trial court. *Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15, *disc. review denied*, 304 N.C. 195, 285 S.E.2d 99 (1981). DSS had to prove the existence of grounds to terminate respondent's parental rights by clear, cogent, and convincing evidence. *Id.* This Court has stated that the trial judge may "decline to render any judgment until the close of all the evidence, and except in the clearest cases, he should defer judgment until the close of all the evidence." *In re Becker*, 111 N.C. App. at 92, 431 S.E.2d at 825 (citing *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973)). Thus, the question whether counsel's failure to move to dismiss evidences a lack of competent counsel turns on whether the motion could have been granted under the circumstances.

To support a case for parental termination, petitioner had to show that respondent willfully left her child in foster care for twelve months. N.C. Gen. Stat. § 7A-289.32(3). In addition, petitioner had the burden of proving lack of reasonable progress and lack of positive response by the mother during this period. *In re Harris*, 87 N.C. App. 179, 185, 360 S.E.2d 485, 488 (1987). Petitioner met both burdens by clear and convincing evidence. DSS's witnesses demonstrated that the minor child had been in foster care for more than twelve months, and that respondent mother failed to show reasonable progress or a positive response toward improving the situation. Moreover, witnesses testified as to the inability of respondent to care for her child and to respondent's failure to show any progress in her therapy until her parental rights were in jeopardy.

DSS's evidence further showed that it had tried diligently to maintain contact with respondent, by sending at least seventy-two written update notices to respondent concerning the minor child's progress. In addition, respondent moved several times without informing DSS as to where she could be located. Based on all of this evidence, the trial court could not have properly granted a motion to dismiss at the end of DSS's case. Therefore, counsel's failure to move for dismissal

IN RE OGHENEKEVEBE

[123 N.C. App. 434 (1996)]

at the end of DSS's evidence was not prejudicial. Except in the clearest cases, the trial judge should defer judgment until the close of all the evidence. *In re Becker*, 111 N.C. App. at 92, 431 S.E.2d at 825. We find that the evidence presented pursuant to N.C. Gen. Stat. § 7A-289.32(3) was sufficient to withstand a motion to dismiss at the close of DSS's evidence.

Next, respondent argues counsel failed to object to inadmissible and prejudicial testimony, and claims that counsel introduced testimony and exhibits that were potentially harmful to respondent's case. In a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it. *Gunther v. Blue Cross/Blue Shield*, 58 N.C. App. 341, 344, 293 S.E.2d 597, 599, *disc. review denied*, 306 N.C. 556, 294 S.E.2d 370 (1982); *see* N.C.R. Evid. 403. Respondent claims that potentially prejudicial issues were discussed during the trial including: allegations of sexual abuse; failure to provide child support; allegations of criminal conduct; and abandonment. These issues were not involved in the final decision since no findings of fact were made regarding these issues except for several allegations of sexual abuse. Even then, and as noted in the trial court's findings of fact, the trial court did not find these allegations credible. Accordingly, the trial court is presumed to have made its findings based on other competent evidence. *Id.* It is manifest that the trial court only considered proper findings of fact in arriving at its conclusions of law. The actions of respondent's counsel, though of questionable strategic value, do not constitute inadequate assistance of counsel.

Respondent's final assignment of error regarding ineffective assistance of counsel points to the attorney's failure to effectively advocate that termination was not in the best interests of the child. However, respondent's counsel stressed to the court that respondent showed progress by improving in the three months prior to trial, and by demonstrating that the minor child wanted to return to his mother. N.C. Gen. Stat. § 7A-289.22(3) (1995) is grounded in a policy dedicated to placing consideration of the best interests of the child over the conflicting interests of the parent, with respect to the termination of parental rights. In parental termination cases of this posture, the welfare or best interests of the child should always be given the sort of paramount consideration "to which even parental love must yield." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Although counsel attempted to argue that termination was not in the best interests of the child, the trial court found to the contrary. This

IN RE OGHENEKEVEBE

[123 N.C. App. 434 (1996)]

unsuccessful argument is not equivalent to ineffective assistance. In sum, respondent was not denied a fair trial due to ineffective assistance of counsel.

II. Findings of Fact and Conclusions of Law

[2] The second issue is whether the findings of fact made by the trial court were supported by the evidence, thus supporting the conclusions of law based on those findings of fact. When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 112, 362 S.E.2d 807, 811 (1987). In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). If there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary. *Id.*

On appeal, the standard of review from a trial court's decision in a parental termination case is whether there existed clear, cogent, and convincing evidence of the existence of grounds to terminate respondent's parental rights. *In re Becker*, 111 N.C. App. at 92, 431 S.E.2d at 825. Respondent argues that a number of the trial court's findings of fact were not supported by the evidence and that conclusions based on those findings are in error.

A trial court has the authority to terminate parental rights in the exercise of its discretion pursuant to N.C. Gen. Stat. § 7A-288. *Forsyth County Dept. of Social Services v. Roberts*, 22 N.C. App. 658, 660, 207 S.E.2d 368, 370 (1974). N.C. Gen. Stat. § 7A-289.32(3) states that a trial court may terminate parental rights upon a finding that:

The parent has *willfully* left the child in foster care for more than 12 months without showing . . . that reasonable progress . . . has been made within 12 months in correcting those conditions which led to the removal of the child or without showing positive response within 12 months to the diligent efforts of a county Department of Social Services

(Emphasis added). Under this section, willfulness means something less than willful abandonment. *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). A finding of willfulness does not require a showing of fault by the parent. *In re Bishop*, 92 N.C. App. at 669, 375 S.E.2d at 681.

IN RE OGHENEKEVEBE

[123 N.C. App. 434 (1996)]

Willfulness may be found under this statute where the parent, recognizing her inability to care for the child, voluntarily leaves the child in foster care. *Id.* In addition, willfulness is not precluded just because respondent has made some efforts to regain custody of the child. *In re Nolen*, 117 N.C. App. at 699, 453 S.E.2d at 224. Even though respondent in this case attempted to regain custody of her child, willfulness can still be found under N.C. Gen. Stat. § 7A-289.32(3) because respondent left her minor child in foster care, for over twelve months, without showing reasonable progress or a positive response toward the diligent efforts of DSS.

Further, respondent argues that DSS did not actually offer certain services to respondent as noted in the trial court's findings of fact. We do not agree. There is evidence in the transcript of several of the services provided including: drafting of the agency-parent agreement which respondent refused to sign; payment by DSS for parenting classes; referrals to psychiatric and psychological services; supervision of visitation; referral and placement in therapeutic foster home; referral for Willie M. Certification; a provision for clothing; a provision for transportation; cash payments for the minor child's care; and frequent written updates to respondent from DSS.

Respondent further states that the trial court erred in finding that respondent did not benefit from her parenting classes as she has not been given an opportunity to demonstrate her newly learned skills. We disagree with respondent's assessment of events. Respondent was given an opportunity to demonstrate her parenting skills, albeit in a classroom setting. Since respondent's parenting skills were inadequate, she was denied the opportunity to interact with her son in a private setting.

Respondent claims that the finding of fact regarding her claims of racial bias against her psychological evaluator, her social worker at DSS, and the guardian ad litem, are incorrect. Based on respondent's testimony, the trial judge determined that respondent dismisses any theory with which she does not agree, and additionally claims that those who disagree with her are persecuting her because of her race. Sorting through such allegations is a task best left to the determination of the trial court. The function of trial judges in nonjury trials is to weigh and determine the credibility of a witness. *Ingle v. Ingle*, 42 N.C. App. 365, 368, 256 S.E.2d 532, 534 (1979). The demeanor of a witness on the stand is always in evidence. *State v. Mullis*, 233 N.C. 542, 544, 64 S.E.2d 656, 657 (1951). All of the findings of fact regarding

SETZER v. BOISE CASCADE CORP.

[123 N.C. App. 441 (1996)]

respondent's in-court demeanor, attitude, and credibility, including her willingness to reunite herself with her child, are left to the trial judge's discretion. Therefore, any of the findings of fact regarding the demeanor of any of the witnesses are properly left to the determination of the trial judge, since she had the opportunity to observe the witnesses.

Finally, respondent argues that the trial court erred by ultimately concluding that respondent's parental rights should be terminated. Respondent maintains the trial court's conclusion to terminate is not supported by sufficient findings of fact. Based on the facts, *supra*, it is evident that proper and adequate grounds did exist for the termination of parental rights. Therefore, the decision of the trial court is

Affirmed.

Judges EAGLES and WYNN concur.

TREVA SETZER, ADMINISTRATRIX OF THE ESTATE OF JACK M. SETZER, PLAINTIFF V.
BOISE CASCADE CORPORATION, EMPLOYER; AND SEDGWICK JAMES OF THE
CAROLINAS, SERVICING AGENT; DEFENDANTS

No. COA94-1253

(Filed 6 August 1996)

**1. Appeal and Error § 7 (NCI4th)— failure to comply with
Rules of Appellate Procedure—appeal dismissed**

Because defendants' contentions as to the competency of plaintiff's expert witness and his testimony were conclusory and not supported by specific objections in the record and because the arguments in defendants' brief did not contain related assignments of error, defendants' appeal is dismissed.

**Am Jur 2d, Appellate Review § 547; Trial §§ 429, 1476,
1626.**

**Sufficiency in federal court of motion in limine to pre-
serve for appeal objection to evidence absent contempo-
rary objection at trial. 76 ALR Fed. 619.**

SETZER v. BOISE CASCADE CORP.

[123 N.C. App. 441 (1996)]

2. Workers' Compensation § 401 (NCI4th)— temporary total disability benefits—failure of record to contain findings of fact or conclusions of law—case remanded to Industrial Commission

Because the Industrial Commission's opinion and award did not contain any findings of fact or conclusions of law regarding plaintiff's entitlement to temporary total disability, the case must be remanded to the Industrial Commission for further proceedings to determine if plaintiff is entitled to temporary total disability benefits and, if so, the amount of these benefits.

Am Jur 2d, Administrative Law §§ 388, 522, 540; Workers' Compensation §§ 616, 690, 691.

Judge WALKER dissenting in part and concurring in part.

Appeal by plaintiff and cross-notice of appeal by defendants from the opinion and award entered 1 August 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 August 1995.

Patrick, Harper & Dixon, by Gary F. Young, for plaintiff-appellee/appellant.

Teague, Campbell, Dennis & Gorham, by Thomas M. Clare and Bryan T. Simpson, for defendant-appellants/appellees.

McGEE, Judge.

In 1973 decedent, Jack M. Setzer, began working for defendant, Boise Cascade Corporation. A year or two later decedent became the "starch man" at the Boise Cascade cardboard container facility in Newton, North Carolina. Decedent held that position until 1983 when he became a general maintenance man for the remainder of his employment, although he continued to occasionally substitute as the starch maker. Both positions required decedent to handle a variety of chemicals.

As the "starch man," decedent made three to four batches of starch per day in two 1500 gallon holding tanks with a formula which included cornstarch, caustic soda (sodium hydroxide), borax, resin and large quantities of water. In addition to mixing the starch batches, decedent had to waterproof and preserve the mixture by adding various resins and formaldehyde to the batches on a weekly basis. Material safety data sheets provided by defendant indicated that two of these resins contained formaldehyde.

SETZER v. BOISE CASCADE CORP.

[123 N.C. App. 441 (1996)]

While working with the various chemicals, decedent was supposed to wear protective gear which occasionally decedent failed to wear. He did not wear a mask or a respirator when carrying the buckets of formaldehyde because he had been told that he only needed protective gear when he mixed the caustic soda. The starch mixture, as well as the formaldehyde and resins he handled, frequently splashed onto decedent, burning holes in his clothes and causing burns and blisters on his body.

In April 1975, soon after decedent became the principal "starch man," he began experiencing severe abdominal pain, vomiting, dizzy spells and nausea. Decedent's physician discovered a gangrenous gall bladder and removed it on 17 April 1975. Over the next decade, decedent was treated by Drs. Wayne Boyles and D.W. Michael for a variety of symptoms including: bloody stools, red bumps on his head, aching pains in his joints, difficulty breathing, pain and numbness in his arms and chest, epigastric pain, nausea and dizziness.

In the fall of 1986, decedent became ill for four to six weeks and lost over forty pounds during this period of time. Decedent's regular physicians referred him to Dr. Leland Cook, who treated decedent for severe pancreatitis, and eventually released him to work in April 1987. Decedent continued to experience abdominal pain, nausea, and vomiting after returning to work and he was finally hospitalized in June 1987. Test results indicated that decedent had carcinoma of the pancreas with metastases to the lung. Decedent died on 18 January 1988.

Decedent's wife filed a claim with the North Carolina Industrial Commission which was heard in February 1993. Following the hearing, the depositions of Frederick D. Williams, Ed.D., and William R. Berry, M.D., were taken and submitted into the record. Plaintiff's witness, Dr. Williams, who had met decedent a number of years prior to decedent's death, was qualified without objection from defendants as an expert in the field of environmental health. Dr. Williams testified he researched decedent's pancreatic cancer to see whether it was linked to any of the chemicals with which decedent worked while he was the "starch man." Among Dr. Williams' findings was that decedent had been exposed to formaldehyde at levels which were much higher than recommended federal government guidelines. Additionally, Dr. Williams testified that pancreatic cancer has been linked to industrial chemical exposure and that studies have shown that employees in the paper industry show a significant level of pan-

SETZER v. BOISE CASCADE CORP.

[123 N.C. App. 441 (1996)]

creatic cancer which is higher than the national average. He stated that in his opinion, decedent's cancer was probably caused by his exposure to these industrial chemicals.

Dr. Berry, a physician specializing in oncology and hematology, testified for the defense. He reviewed decedent's medical records, as well as Dr. Williams' deposition, but concluded "it would still be difficult, if not impossible, to say what caused this particular man's pancreatic [cancer]." Contrary to Dr. Williams' opinion, Dr. Berry stated that there was no proven industrial exposure which was known to cause pancreatic cancer and little to no evidence to support the conclusion that formaldehyde causes pancreatic cancer.

A deputy commissioner filed an opinion and award denying plaintiff's claim on 1 March 1994. Among other things, the deputy commissioner found decedent died of "metastatic carcinoma of the pancreas with lung and abdomen involvement. . . . [but] it was not related to or caused by his employment or exposure to formaldehyde, caustic soda or other chemicals at defendant-employer's facility."

In a decision filed 1 August 1994, the Full Commission reversed the deputy commissioner and awarded plaintiff workers' compensation benefits, including medical expenses, under N.C. Gen. Stat. §§ 97-25, 97-38, 97-39. The Full Commission concluded "[decedent's] exposure to formaldehyde and other various chemicals which caused his resulting pancreatic cancer, constitutes an occupational disease characteristic and peculiar to his employment to which the general public is not equally exposed." From this opinion and award, both plaintiff and defendants appeal.

I. Defendants' Appeal

[1] All three of defendants' issues involve the question of whether plaintiff's witness, Dr. Fred Williams, was a competent expert who presented reliable and relevant evidence upon which the Industrial Commission could support its findings of fact and conclusions of law.

N.C. Gen. Stat. § 97-86 states Industrial Commission opinions and awards may be appealed to this Court "for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure." G.S. 97-86. The North Carolina Rules of Appellate Procedure are mandatory and failure to follow them subjects an appeal to dismissal.

SETZER v. BOISE CASCADE CORP.

[123 N.C. App. 441 (1996)]

Marsico v. Adams, 47 N.C. App. 196, 197, 266 S.E.2d 696, 698 (1980). Because defendants failed to comply with these Rules, we do not reach the substantive merits of defendants' arguments on appeal. Specifically, the competency of Dr. Williams and his testimony is not properly preserved for this Court's consideration under Rule 10. N.C.R. App. P. 10(b)(1). Additionally, none of the questions presented in defendants' brief identifies the related assignments of error as required under Rule 28. N.C.R. App. P. 28(b)(5).

A. Rule 10

Rule 10(b) requires that certain action be taken to preserve the right to challenge the trial court's decision below. N.C.R. App. P. 10(b)(1). Generally, a party's failure to enter a timely and specific objection constitutes a waiver of his right to challenge the alleged error on appeal. *Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E.2d 227, 233-34 (1980). Even where a general objection is sufficient, its benefit may be lost when substantially the same evidence is later admitted without renewing the earlier objection. *Id.* This rule applies to objections to the competency of testimony. *Meroney v. Avery*, 64 N.C. 312, 313 (1870) (stating that objections to the competency of testimony must be timely made or they are waived). When testimony is admitted without objection, the appellant is precluded from raising an objection for the first time on appeal. *Cornelius v. Helms*, 120 N.C. App. 172, 177, 461 S.E.2d 338, 341 (1995), *disc. review denied*, 342 N.C. 653, 467 S.E.2d 709, *reconsid. dismissed*, 342 N.C. 894, 467 S.E.2d 909 (1996).

We have reviewed the record and find most of defendants' contentions as to the competency of plaintiff's expert witness and his testimony are conclusory and not supported by specific objections in the record. Defendants must first have objected to this witness and his testimony in order to preserve these issues for appellate review. N.C.R. App. P. 10(b)(1). In the few instances where defendants objected to portions of this witness' testimony, substantially the same testimony was later admitted without objection; therefore the benefit of the earlier objections was lost. *Power Co.*, 300 N.C. at 68, 265 S.E.2d at 233-34.

Finally, we note as to the adequacy of the expert witness' various reports and studies, defendant had ample opportunity to impeach these studies during cross-examination of the witness and by introducing other expert witnesses to discredit these studies or this witness.

SETZER v. BOISE CASCADE CORP.

[123 N.C. App. 441 (1996)]

B. Rule 28

Defendants are also in violation of Rule 28 because the arguments in their brief do not contain the related assignments of error. Rule 28 summarizes the function and content of appellate briefs and requires the parties to clearly define the questions presented to the reviewing court. N.C.R. App. P. 28(a). An appellant's brief is required to contain, among other things, a separate argument for each question presented and "[i]mmediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief . . . will be taken as abandoned." N.C.R. App. P. 28(b)(5); *See also Hines v. Arnold*, 103 N.C. App. 31, 37-38, 404 S.E.2d 179, 183 (1991). For the foregoing reasons, defendants' appeal is dismissed.

II. Plaintiff's Cross-Appeal

[2] In a cross-appeal to this Court, plaintiff argues that the Industrial Commission failed to award benefits for temporary total disability from 2 June 1987, the date decedent was diagnosed with cancer, until 18 January 1988, the day decedent died. Plaintiff contends that this period of time is compensable under N.C. Gen. Stat. § 97-29.

Defendants argue that decedent did not suffer from a compensable occupational disease; however, they concede that if this Court determines that decedent did suffer a compensable occupational disease, then plaintiff would be entitled to receive the unpaid, temporary total disability benefits from 2 June 1987 until decedent's death in January 1988. The record before us is insufficient to consider the question of temporary total disability compensation which may be owed to plaintiff.

This Court's review of an Industrial Commission decision is limited to whether there is any competent evidence to support the Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982). Because the Full Commission's opinion and award does not contain any findings of fact or conclusions of law regarding plaintiff's entitlement to temporary total disability, this case must be remanded to the Industrial Commission for further proceedings to determine if plaintiff is entitled to temporary total disability benefits and if so, a determination of the amount of these benefits. *See Stanley v. Hyman-Michaels Co.*,

SETZER v. BOISE CASCADE CORP.

[123 N.C. App. 441 (1996)]

222 N.C. 257, 266, 22 S.E.2d 570, 576 (1942) (case remanded where the Commission failed to find fact).

Dismissed in part and remanded in part.

Judge COZORT concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER dissenting in part and concurring in part.

I recognize the deficiencies in defendants' appeal as pointed out by the majority. However, in order to prevent any manifest injustice to the defendants, I would nonetheless review the merits of their appeal pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. *State v. Petty*, 100 N.C. App. 465, 466, 397 S.E.2d 337, 339 (1990).

All three questions raised in defendants' brief involve the central issue of whether plaintiff's witness, Dr. Fred Williams, was competent to testify regarding the cause of decedent's pancreatic cancer. Dr. Williams was qualified without objection by defendants as an expert who examines the relationship between occupational exposures and the development of disease in the field of environmental health. Dr. Williams, relying on medical and scientific literature, testified that pancreatic cancer has been linked to industrial chemical exposure. Further, Dr. Williams opined that decedent's pancreatic cancer was probably caused by his exposure to formaldehyde, sodium hydroxide, and other industrial chemicals during his employment with Boise Cascade.

It is well recognized that an expert may testify regarding the ultimate issue. *Beam v. Kerlee*, 120 N.C. App. 203, 215, 461 S.E.2d 911, 920 (1995), *cert. denied*, 342 N.C. 651, 457 S.E.2d 703 (1996). Furthermore, our Supreme Court has recently clarified the task of trial judges when faced with a proffer of expert scientific testimony in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993). In *Daubert*, the Court held that the trial judge must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert*, 509 U.S. at —, 125 L.Ed.2d at 482. The Court said that a pertinent consideration is whether the "theory or technique has been subjected to

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

peer review and publication." *Daubert*, 509 U.S. at —, 125 L.Ed.2d at 483.

Here, Dr. Williams cited at least five studies regarding pulp and paper mill workers, which demonstrated that employees in the pulp and paper industry suffer from pancreatic cancer at a higher rate than the national average. Dr. Williams also relied on other textbook materials to support his position that a link has been established between occupation and the incidence of pancreatic cancer. Therefore, we find that there was a sufficient factual basis to support Dr. Williams' testimony.

Additionally, I note that the defendants had ample opportunity to cross-examine Dr. Williams regarding the scientific and medical literature upon which he relied. Also, defendants introduced their own expert in an effort to refute the testimony of Dr. Williams.

However, it is the province of the Industrial Commission, not the appellate courts, to weigh the credibility of the evidence. Therefore, the Commission did not err by accepting the expert opinion of Dr. Williams. Accordingly, I would affirm the decision of the Full Commission on this issue.

With regard to plaintiff's cross-appeal, I concur with the majority that the case must be remanded to the Industrial Commission for further proceedings to determine if plaintiff is entitled to temporary total disability benefits.

TRACY PATTERSON, EMPLOYEE, PLAINTIFF v. MARKHAM & ASSOCIATES AND
SUNSTAR HOMES, EMPLOYERS, CONSOLIDATED ADMINISTRATORS AND NORTH
CAROLINA HOME BUILDERS FUND, CARRIER, DEFENDANTS

No. COA95-653

(Filed 6 August 1996)

1. Workers' Compensation § 46 (NCI4th)— failure of subcontractor to pay insurance premium—no knowledge by general contractor—general contractor not statutory employer

The Industrial Commission did not err by finding that the general contractor, Sunstar, was not a statutory employer under

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

N.C.G.S. § 97-19 where the evidence tended to show that plaintiff worked for Markham, a subcontractor, on a job which was contracted to Markham by Sunstar; when Markham began working for Sunstar, the insurance agent sent Sunstar a certificate of insurance indicating coverage for Markham for one year; and when Markham's insurance was canceled for its failure to pay its premium, Sunstar was not notified of the cancellation.

Am Jur 2d, Workers' Compensation §§ 71, 172, 229, 552.

2. Workers' Compensation § 9 (NCI4th)— workers' compensation insurance properly canceled—no compensation from self-insurance fund

A self-insurance fund and its servicing agent were not required to notify the principal contractor of cancellation of a subcontractor's workers' compensation insurance coverage where they had no knowledge of the certificate of insurance provided to the principal contractor on behalf of the subcontractor. Where competent evidence existed to support the Industrial Commission's finding that there was a proper cancellation of the subcontractor's compensation coverage by the servicing agent for the self-insurance fund, the Commission was justified in concluding that the subcontractor's injured employee was not entitled to compensation from the self-insurance fund.

Am Jur 2d, Workers' Compensation §§ 50, 52-54.

Appeal by plaintiff-appellant from Opinion and Award entered 6 March 1995 by the North Carolina Industrial Commission, J. Randolph Ward, Commissioner. Heard in the Court of Appeals 28 February 1996.

L. Holt Felmet for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by M. Reid Acree, Jr. and Richard M. Lewis, for defendant-appellee Sunstar Homes.

The Sanford Law Firm, by Wanda Blanche Taylor, for defendant-appellee North Carolina Home Builders Self Insurers Fund.

WYNN, Judge.

On 11 December 1992, plaintiff Tracy Patterson suffered an injury by accident arising out of and in the course of his employment when

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

he fell from a scaffold while working for defendant Markham & Associates ("Markham"). Plaintiff's accident occurred on a project that defendant Sunstar Homes ("Sunstar")—the principal contractor—had subcontracted Markham to perform carpentry work on the Village Lake Subdivision in Wake County, North Carolina. The contract required Markham to carry workers' compensation insurance.

Prior to the time of the contract, Markham had applied for workers' compensation insurance from the Vardell Godwin Insurance Agency ("Godwin") and through Godwin, Markham purchased insurance from the North Carolina Home Builders Trust ("Home Builders"), a self insurance fund serviced by Consolidated Administrators ("Consolidated"). To fulfill Markham's contractual obligation with Sunstar, Godwin mailed Sunstar a certificate indicating insurance coverage for Markham from 1 April 1992 until 1 April 1993. Under the terms of the Home Builder's agreement with Godwin, upon sending a certificate of insurance on behalf of a subcontractor, Godwin was required to send a copy of the certificate to Consolidated. However, Godwin did not send Consolidated a copy of the certificate of insurance that it sent to Sunstar.

In July of 1992, Consolidated notified Markham that its workers' compensation insurance would be terminated on 7 August 1992, due to Markham's failure to pay the policy premiums in a timely fashion. In response, Markham paid the past due bill in full and the insurance remained in effect. In September of 1992, Consolidated sent Markham another notice of termination stating that the insurance coverage would be terminated effective 3 October 1992, again due to Markham's failure to pay the premiums. Once again, Markham paid the past due bill in full and the coverage remained in effect. In November of 1992, Consolidated sent another notice of termination to Markham stating that the insurance would be terminated effective 3 December 1992 for failure to pay premiums. This time, however, Markham did not send in the past due premiums in a timely fashion; thus, Consolidated notified Markham that its insurance coverage through Home Builders terminated on 3 December 1992.

Eight days after Home Builders terminated Markham's insurance coverage, plaintiff suffered the injury which led to the instant action.

In February of 1993, after discovering that Markham's insurance coverage had lapsed, plaintiff filed a claim with the Industrial Commission seeking worker's compensation benefits. Plaintiff named Markham, Sunstar, Consolidated and Home Builders as defendants,

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

contending that these parties were liable for payment of workers' compensation benefits due to the failure by Consolidated to notify Sunstar that Markham's insurance coverage lapsed.

Deputy Commissioner Tamara R. Nance dismissed the claims against Home Builders (and its administrator, Consolidated) and Sunstar and found Markham liable for all of plaintiff's injuries. The Full Commission ("Commission") modified and affirmed the decision of the Deputy Commissioner and found that Markham alone was liable for plaintiff's workers' compensation benefits. From this decision, plaintiff appealed.

The issues on appeal are (I) whether the Commission erred in finding that Sunstar was not a statutory employer under N.C. Gen. Stat. § 97-19 (1991) and (II) whether the Commission erred in finding that Markham was solely liable for worker's compensation benefits due to plaintiff. We affirm the Commission's decision on both issues.

We note at the outset that findings of fact made by the Industrial Commission are conclusive on appeal if supported by competent evidence. N.C.G.S. § 97-86; *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). This is so even if there is evidence which would support a finding to the contrary. *Id.* Hence, on appeal, this Court is limited to two inquiries: (1) whether any competent evidence exists before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decision. *Id.*

I.

[1] Plaintiff first contends, in essence, that the Commission erred by finding that Sunstar was not a statutory employer under N.C.G.S. § 97-19. We disagree.

The "statutory employer" statute, N.C.G.S. § 97-19, provides in relevant part:

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring *from such subcontractor* or obtaining from the Industrial Commission *a certificate, issued by a workers' compensation insurance carrier*, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable . . . to the same ex-

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

tent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any such subcontractor, any principal or partner of such subcontractor, or any employee of such subcontractor for compensation or other benefits under this Article

(emphasis supplied).

To become a statutory employer under N.C.G.S. § 97-19, two conditions must be met. "First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. Second, the subcontractor does not have workers' compensation insurance coverage covering the injured employee." *Rich v. R.L. Casey, Inc.*, 118 N.C. App. 156, 159, 454 S.E.2d 666, 667, *disc. review denied*, 340 N.C. 360, 458 S.E.2d 190 (1995). If these conditions are met, then the principal contractor is a statutory employer and can be held liable for the payment of compensation and other benefits.

In the subject case, the Commission made the following relevant findings of fact:

4. On 13 September 1992, Markham entered into a contract with Sunstar Homes to perform work as a framing subcontractor. In that contract Markham agreed to furnish Sunstar certificates of insurance covering workers' compensation and general liability

. . . .

7. The Vardell Godwin Insurance Agency was a field representative for North Carolina Home Builders Self-Insurance Fund [T]he Godwin Agency was an agent of Home Builders for the purpose of issuing certificates of insurance which would reflect coverage by Home Builders. The field services agreement required that the Godwin Agency furnish Consolidated Administrators with a copy of every certificate of insurance it issued. This was to enable Consolidated Administrators to notify the certificate holder if coverage was canceled before expiration of the policy term The certificate, on its face, disclaims any duty or

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

promise to give its [holder] actual notice [of cancellation], although it states the issuer will “endeavor” to do so.

....

9. When Markham began working for Sunstar Homes as a sub-contractor in September 1992, Godwin sent Sunstar Homes a certificate of insurance indicating coverage for Markham through North Carolina Builders Trust From 1 April 1992 to 1 April 1993. Godwin did not send a copy of this certificate to Consolidated Administrators.

10. On 4 November 1992, Consolidated Administrators sent Markham a third cancellation notice, indicating that his workers' compensation coverage would be terminated 3 December 1992 for nonpayment of the September 1992 premium. At that point, Markham also owed the premium for October 1992.

11. Markham's self-insured coverage through Home Builders terminated on 3 December 1992, and as of that date Markham became a non-insured employer. He did not send in November's premium by 3 December 1992.

....

13. Sunstar Homes did not have notice of the cancellation and therefore did not start deducting a percentage of Markham's pay to cover the sub-contractor's employees. Sunstar relied in good faith on the certificate of insurance issued by the Godwin Agency for Markham, and did not have actual knowledge of the cancellation of coverage prior to the injury.

....

17. Sunstar Homes complied with N.C.G.S. § 97-19 by obtaining a certificate of insurance, at the time of subletting its contract to Markham, showing that Markham had complied with the coverage requirements of N.C.G.S. § 97-93, and thereafter in good faith relied on its purported validity in the absence of notice of cancellation prior to the expiration of the policy period.

The record in this case demonstrates that there was competent evidence to establish that plaintiff worked for Markham, a subcontractor, on a job that was contracted to Markham by Sunstar, the principal contractor. The evidence further establishes and the

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

Commission found as fact that when Markham began working for Sunstar, Godwin sent Sunstar a certificate of insurance indicating coverage for Markham from 1 April 1992 to 1 April 1993. Moreover, when Markham's insurance was cancelled for its failure to pay its premium, Sunstar was not notified of the cancellation. We, therefore, find that there was competent evidence to support the Commission's findings of fact.

Based on these findings of fact, the Commission made the following pertinent conclusion of law:

2. Sunstar Homes is not liable for compensation due plaintiff for injuries sustained while in the employ of its subcontractor. N.C.G.S. § 97-19.

This conclusion is supported by the Commission's finding that Sunstar acted in compliance with N.C.G.S. § 97-19 by obtaining a certificate of insurance showing coverage for Markham for one year. The findings further show that Sunstar did not have knowledge of the cancellation prior to plaintiff's injury. Accordingly, we conclude that the Commission's findings support the conclusion that Sunstar was not a statutory employee.

II.

[2] Plaintiff next contends that the Commission erred in finding that Markham was solely liable for workers' compensation benefits due to plaintiff. He alleges that Consolidated did not properly cancel plaintiff's workers' compensation coverage because Sunstar never received notice of the cancellation of Markham's insurance. We disagree.

The Commission made the following pertinent findings of fact:

2. Defendant Markham represented to plaintiff that Markham carried workers' compensation insurance to cover plaintiff. Defendant Markham deducted ten percent of plaintiff's pay to help cover his workers' compensation premium, in violation of N.C.G.S. § 97-21.

....

6. In September 1992 Markham, was self-insured through Home Builders, with Consolidated Administrators as the servicing agent. Each month Consolidated Administrators would send

PATTERSON v. MARKHAM & ASSOCIATES

[123 N.C. App. 448 (1996)]

Markham a form on which he was to calculate their premium owed for that month and return it to Consolidated Administrators with a check for the amount due. September's premium was due October 1st, October's premium due November 1st, etc. On two occasions prior to November 1992, Markham's coverage through the self-insurer's fund was terminated for non-payment of premiums, but then reinstated after payment of a fee by separate check, and by paying the premiums and completing the paperwork up to date.

....

16. Plaintiff had no knowledge of the cancellation of Markham's coverage and had no knowledge of any facts surrounding the issuance or validity of the certificate of insurance. Consolidated Administrators had no knowledge that Markham was deducting from his employees' pay to pay the premiums

....

18. There was proper cancellation by Consolidated Administrators of Markham's coverage through North Carolina Home Builders, and therefore Markham was non-insured on the date of injury. N.C.G.S. § 97-99.

Additionally, the Commission made the following relevant conclusion of law:

3. Home Builders did not breach a legal duty to give notice of cancellation to any third person Plaintiff was not a third party beneficiary of the Godwin Agency's contract with Home Builders Plaintiff is not entitled to compensation from defendant Home Builders.

In the case before us, Godwin was required to furnish Consolidated, Home Builders' servicing agent, with a copy of every certificate of insurance it issued so that Consolidated would be able to notify the certificate holder if coverage was cancelled before the expiration of the policy term. However, Godwin never sent Consolidated a copy of the certificate of insurance sent by Godwin to Sunstar on behalf of Markham (we note that Godwin is not a party in this action). Thus, there is evidence to support the Commission's finding that Consolidated and Home Builders had no knowledge of the certificate of insurance provided to Sunstar and therefore, was not required to notify Sunstar in the event of cancellation.

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

Accordingly, we find that competent evidence exists to support the Commission's finding that there was a proper cancellation by Consolidated of Markham's coverage and this finding justifies the Commission's legal conclusion that plaintiff is not entitled to compensation from Home Builders.

For the foregoing reasons, the Opinion and Award of the Industrial Commission is,

Affirmed.

Chief Judge ARNOLD and Judge MARTIN, John C. concur.

ROBERT E. TIMMONS, JR., EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION, EMPLOYER; SELF-INSURER; DEFENDANT

No. COA95-835

(Filed 6 August 1996)

1. Workers' Compensation § 230 (NCI4th)— paraplegic awarded permanent disability—return to full-time employment—benefits not terminated

Since N.C.G.S. § 97-31(17) provides that the loss of both legs constitutes total and permanent disability to be compensated according to N.C.G.S. § 97-29, and that statute provides for life-time benefits to the injured employee, the Industrial Commission correctly denied defendant's motion to terminate plaintiff's workers' compensation benefits made after plaintiff paraplegic returned to full-time employment.

Am Jur 2d, Workers' Compensation §§ 381, 382, 431.

2. Workers' Compensation § 219 (NCI4th)— disabled employee—expenses to make home accessible—award proper

The Industrial Commission properly ordered that defendant "pay for adding to plaintiff's new home those accessories necessary to accommodate plaintiff's disabilities" rather than pay for construction of the entire house or pay nothing for making the home accessible to plaintiff's handicap since the expense of hous-

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

ing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Workers' Compensation Act, while costs of modifying such housing to accommodate one with extraordinary needs occasioned by a workplace injury is not an ordinary expense of life for which the statutory substitute wage is intended as compensation, and such extraordinary and unusual expenses are properly embraced in the "other treatment" language of N.C.G.S. § 97-25.

Am Jur 2d, Workers' Compensation §§ 443, 444.

3. Workers' Compensation § 399 (NCI4th)— future disputes ordered to mediation—award proper

The Industrial Commission did not err in referring to mediation any "disputes which may arise with respect to the costs and building of the home contemplated by plaintiff," since N.C.G.S. § 97-80(c) specifically authorizes the Commission to require parties to participate in mediation under rules adopted by it, and, foreseeing that disputes might reasonably arise between the parties with respect to the construction of plaintiff's residence and the expenses which might properly be charged to the respective parties, the Commission wisely required the parties to engage in a more expedient method of resolving such disputes than the necessity of scheduling hearings before a deputy which might prolong the construction process and increase its expense.

Am Jur 2d, Workers' Compensation §§ 607, 608.

4. Workers' Compensation § 471 (NCI4th)— attorney's fees as costs—award proper—medical rehabilitation expert's fees—order taxing as costs remanded

The Industrial Commission did not err in ordering defendant to pay plaintiff's attorney's fees where defendant appealed the award in favor of plaintiff to the Full Commission which affirmed the award, and the requirements of N.C.G.S. § 97-88 were thus satisfied; however, the Commission's order taxing as costs the charges of plaintiff's medical rehabilitation expert for preparing a "life care plan" for plaintiff and for providing deposition testimony as an expert witness must be remanded, since it would be proper to tax her fees for her testimony as a part of the costs, but not her fees to prepare the "life care plan," and the Commission's order did not so limit the charges taxed to defendant as costs.

Am Jur 2d, Workers' Compensation §§ 722-726.

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

Workmen's compensation: Attorney's fee or other expenses of litigation incurred by employee in action against third party tortfeasor as charge against employer's distributive share. 74 ALR3d 854.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission entered 26 May 1995. Heard in the Court of Appeals 27 March 1996.

Folger and Folger, by Fred Folger, Jr., for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller, for defendant-appellant.

MARTIN, John C., Judge.

In July 1980, plaintiff sustained a compensable injury in the course and scope of his employment with defendant, as a result of which he was rendered paraplegic. At the time of his injury, plaintiff was 19 years old and was earning \$135.20 per week. Pursuant to a Form 21 agreement approved by the Industrial Commission on 6 August 1980, defendant has paid plaintiff workers' compensation benefits for total disability in the amount of \$90.14 per week, as well as medical expenses related to his injury, from the time of the accident to the present. In addition, after plaintiff's injury, defendant paid approximately \$40,250.00 for modifications to plaintiff's parents' home to make it accessible for his use.

In 1982, plaintiff moved from his parents' home to a handicapped accessible apartment where he lived for approximately eight and a half years. In 1989, after a substantial increase in his rent, plaintiff moved back to his parents' home and lived there until January 1991. Apparently desiring additional privacy, however, plaintiff moved to an apartment which is not adapted to accommodate his disability.

On 28 October 1989, plaintiff returned to work as a full-time permanent employee of defendant and, at the time of the hearing, was earning \$17,768.00 per year. Plaintiff also works part-time conducting exercise classes at a health spa.

On 15 June 1992, plaintiff filed a motion requesting the Industrial Commission to order a life care plan to be prepared at defendant's expense to enable plaintiff to receive handicapped housing and rehabilitation services. Plaintiff had acquired land and sought financial

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

assistance from defendant in constructing a handicapped accessible home. Defendant opposed the motion and requested a hearing to determine whether it was obligated to finance such a plan and to provide additional handicapped housing accommodations for plaintiff. Defendant also sought to terminate plaintiff's total disability benefits since plaintiff had returned to full-time employment.

The deputy commissioner entered an opinion and award in which he denied defendant's motion to terminate plaintiff's disability benefits, and allowed in part and denied in part the benefits sought by plaintiff. Both parties appealed. The Full Commission adopted the deputy commissioner's findings and concluded plaintiff was entitled to continuing disability benefits, was not entitled to be provided with a life care plan, but was entitled to financial assistance in constructing a handicapped accessible residence. The Commission: (1) denied defendant's motion to terminate plaintiff's disability benefits; (2) ordered defendant to pay, pursuant to G.S. § 97-25, the expense of rendering the home which plaintiff plans to build accessible to his disabilities; (3) referred to mediation any disputes arising from the construction; (4) ordered defendant to pay plaintiff's attorney fees; and (5) ordered defendant to pay the fees of Dr. Cynthia Wilhelm, a medical rehabilitation expert who drafted a life care plan for plaintiff and provided expert testimony. Defendant appeals.

I.

[1] Defendant employer assigns error to the Commission's order denying its motion to terminate plaintiff's compensation benefits for temporary total disability. Defendant argues that since plaintiff has returned to full-time employment, he is no longer entitled to on-going benefits. We disagree.

At the time of plaintiff's injury, G.S. § 97-31 provided in relevant part:

In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period *and in addition the disability shall be deemed to continue for the period specified*, and shall be in lieu of all other compensation . . . to wit:

(17) The loss of . . . both legs . . . *shall constitute total and permanent disability, to be compensated according to the provisions of G.S. 97-29. . . .*

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

(19) Total loss of use of a member . . . shall be considered as equivalent to the loss of such member

(emphasis added). At that time, G.S. § 97-29 provided in pertinent part:

In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of rehabilitative services shall be paid for by the employer during the lifetime of the injured employee.

(emphasis added).

“When the language of a statute is clear and without ambiguity, ‘there is no room for judicial construction,’ and the statute must be given effect in accordance with its plain and definite meaning.” *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). In this instance, the language of the Act is clear: G.S. § 97-31(17) provides that the loss of both legs constitutes total and permanent disability to be compensated according to G.S. § 97-29, and G.S. § 97-29 provides for lifetime benefits to the injured employee. See *Fleming v. K-Mart Corp.*, 312 N.C. 538, 547 324 S.E.2d 214, 219 (1985) (where employee suffered total loss of both legs, he was entitled under 97-31(17) to compensation for total and permanent disability in accordance with 97-29). The Commission correctly denied defendant’s motion to terminate plaintiff’s workers’ compensation benefits.

II.

[2] Both parties assign error to the Commission’s order requiring that defendant “pay the expense and cost of rendering the home which plaintiff plans to build accessible to his disabilities.” Defendant argues that it should not be required to bear any of the expense of making the residence accessible to plaintiff’s handicap; by cross-assignment of error, plaintiff contends defendant should bear the entire cost of construction of a residence which would accommodate his disabilities. We affirm the opinion and award of the Commission in this regard.

On appellate review of an award of the Industrial Commission, the Commission’s findings of fact are conclusive if supported by com-

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

petent evidence; the legal conclusions drawn by the Commission from its findings of fact, however, are fully reviewable by the appellate courts. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). In summary, the Commission found that although, after plaintiff's injury, defendant had paid for modifications to his parents' residence in order to accommodate his disabilities, plaintiff has since become independent and self-reliant. In addition to working, he has begun to date and has friends over to visit. Plaintiff's requirements, and those of his parents, for privacy are jeopardized by his living at his parents' home. In light of the foregoing factors, the Commission found that plaintiff's needs had changed and the accommodations at his parents' home were no longer appropriate for him. Those findings are supported by competent evidence, most notably the assessment by Dr. Wilhelm, and are conclusive. The question before us is whether the Commission's finding that the accommodations at plaintiff's parents' home are no longer suitable support its conclusion that "plaintiff is entitled to have defendant pay for adding to plaintiff's new home those accessories necessary to accommodate plaintiff's disabilities."

At the time of plaintiff's injury in 1980, G.S. § 97-25 required, in relevant part: "[m]edical, surgical, hospital, nursing services, medicines, . . . rehabilitation services, *and other treatment* including medical and surgical supplies as may reasonably be required to . . . give relief . . . shall be provided by the employer." N.C. Gen. Stat. § 97-25 (1985) (emphasis added). In *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986), the North Carolina Supreme Court held that an employer's duty to provide "other treatment or care" as contained in G.S. § 97-29, was sufficiently broad as to include the duty to provide handicapped accessible housing. *Id.* at 203-04, 347 S.E.2d at 821. In so holding, the Court noted the remedial purpose of the Workers' Compensation Act, and the liberal construction to be accorded its provisions. *Id.* at 199, 347 S.E.2d at 818. In our view, the words "and other treatment" contained in G.S. § 97-25 are susceptible of the same broad construction accorded the similar language of G.S. § 97-29 by the Supreme Court in *Derebery*, and we reject defendant's argument to the contrary.

We do not agree with plaintiff, however, that *Derebery* requires defendant to pay the entire cost of constructing his residence. As pointed out by Justice (later Chief Justice) Billings in her dissent in *Derebery*, the expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

Workers' Compensation Act. The costs of modifying such housing, however, to accommodate one with extraordinary needs occasioned by a workplace injury, such as the plaintiff in this case, is not an ordinary expense of life for which the statutory substitute wage is intended as compensation. Such extraordinary and unusual expenses are, in our view, properly embraced in the "other treatment" language of G.S. § 97-25, while the basic cost of acquisition or construction of the housing is not. Thus, we overrule both defendant's assignment of error and plaintiff's cross-assignment of error and affirm the Commission's order that defendant "pay for adding to plaintiff's new home those accessories necessary to accommodate plaintiff's disabilities."

[3] We reject also a related assignment of error by defendant that the Commission erred when it referred to mediation any "disputes which may arise with respect to the costs and building of the home contemplated by plaintiff in the event that same cannot be resolved between the parties." G.S. § 97-80(c) specifically authorizes the Commission to require parties to participate in mediation under rules adopted by it. Foreseeing that disputes might reasonably arise between the parties with respect to the construction of plaintiff's residence, and the expenses which might properly be charged to the respective parties, the Commission wisely required the parties to engage in a more expedient method of resolving such disputes than the necessity of scheduling hearings before a deputy which might prolong the construction process and increase the expense of construction.

III.

[4] Finally, defendant assigns error to those portions of the Commission's order requiring that it pay plaintiff's attorney's fees and taxing Dr. Wilhelm's charges as part of the costs. We address these claims in turn.

G.S. § 97-88 provides:

If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceed-

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

[123 N.C. App. 456 (1996)]

ings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

As a self-insurer, defendant is subject to the provisions of the statute. The decision of whether to award costs and attorney's fees is within the discretion of the Commission if the requirements of the statute are met. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983), *Estes v. N.C. State University*, 117 N.C. App. 126, 449 S.E.2d 762 (1994). Here, defendant appealed the deputy commissioner's award to the Full Commission, which affirmed the award. Thus, the requirements of the statute were satisfied and it was within the Commission's discretion to award plaintiff the costs, including attorney's fees. We discern no abuse of that discretion.

The Commission's order, however, is unclear with respect to its taxing of Dr. Wilhelm's charges as costs. Dr. Wilhelm prepared a "life care plan" for plaintiff and also provided deposition testimony as an expert witness. While it would be proper to tax Dr. Wilhelm's fees for her testimony as a part of the costs, the Commission's order does not so limit the charges taxed to defendant as costs. Plaintiff argues defendant should be required to pay the expense of the "life care plan" which Dr. Wilhelm prepared as a necessary medical expense for rehabilitative services under G.S. § 97-25. The Commission, however, made no award for the "life care plan" under G.S. § 97-25, and such an award could not be properly characterized as costs. Moreover, defendant correctly observes that the deputy commissioner concluded that plaintiff was not presently entitled to be provided with a life care plan, a conclusion from which plaintiff has not appealed. Because we are unable to discern the Commission's intent with respect to Dr. Wilhelm's charges, we remand the matter of costs to the Industrial Commission for clarification and such further orders with respect thereto as may be proper.

Affirmed in part, remanded in part.

Chief Judge ARNOLD and Judge SMITH concur.

SOTELO v. DREW

[123 N.C. App. 464 (1996)]

THERESA L. SOTELO, PLAINTIFF, v. CHARLES E. DREW, DEFENDANT

No. COA95-482

(Filed 6 August 1996)

Attorney General § 11 (NCI4th); Divorce and Separation § 567 (NCI4th)— URESA action—role of Attorney General—no jurisdiction of trial court to hear Rule 60(b) motion

Where there was nothing in the record indicating the Attorney General was an original party, was asked by plaintiff, the State of Maryland, or the Wayne County District Attorney to intervene as a party, to act as plaintiff's legal representative, or to serve as plaintiff's attorney, the Attorney General's Rule 60(b) motion to set aside the District Court judge's order dismissing plaintiff's claim for child support arrearages was improper, and the trial court lacked jurisdiction to hear the matter, since, unless specifically requested to assist in the matter by the district attorney, the Attorney General's role was to handle the case in the event of an appeal, not a Rule 60(b) motion to set aside judgment.

Am Jur 2d, Attorney General § 21; Desertion and Nonsupport § 149.

Decree for alimony rendered in another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings. 18 ALR2d 862.

Judge GREENE dissenting.

Appeal by the Attorney General from order entered 2 November 1994 by Judge E. Burt Aycock, Jr., in Wayne County District Court. Heard in the Court of Appeals 1 February 1996.

Attorney General Michael F. Easley, by Associate Attorney General Elizabeth J. Weese, for plaintiff-appellant.

Warren, Kerr, Walston, Hollowell & Taylor, L.L.P., by David E. Hollowell and Richard J. Archie, for defendant-appellee.

McGEE, Judge.

Plaintiff, Theresa L. Sotelo, filed a petition for registration and enforcement of a child support order entered on 19 September 1983

SOTELO v. DREW

[123 N.C. App. 464 (1996)]

in the State of Maryland under provisions of the Uniform Reciprocal Enforcement of Support Act (URESA), N.C. Gen. Stat. §§ 52A-29 and 30 (subsequently repealed effective Jan. 1, 1996) and for arrearages accrued under the order. Plaintiff was represented by Assistant District Attorney Claude S. Ferguson as required under N.C. Gen. Stat. § 52A-10.1 (1992). The Maryland order was registered in Wayne County, North Carolina on 20 July 1993. Defendant was served a copy of the Notice of Registration. He retained counsel and filed a Response to Petition on 9 August 1993. Defendant argued he was current in his child support payments under a 1982 N.C. child support order requiring him to pay \$100 per month; that the plaintiff and the State of Maryland had accepted the \$100 per month payments and should be estopped from claiming arrearages under the Maryland order. He also pled the defenses of estoppel, laches, and the statute of limitations, as well as general principles of equity, in bar to any claim for arrearages.

A hearing was held by District Court Judge Kenneth R. Ellis. He entered an Order Confirming Registration on 27 August 1993 which confirmed registration of the Maryland order directing defendant to make payments of \$40.00 per week for child support. Judge Ellis' order also dismissed plaintiff's claim for any arrearage which had accrued under the Maryland order. No appeal was taken from this order.

Almost a year later, the Attorney General, purportedly on behalf of plaintiff, filed a motion to set aside Judge Ellis' order dismissing plaintiff's claim for child support arrearages pursuant to Rule 60(b)(1), (4) and (6) of the Rules of Civil Procedure. A hearing was held by District Court Judge E. Burt Aycock, Jr. in late August 1994. At the hearing, defendant objected to the entry of the Attorney General into the proceeding. An associate attorney general explained to the court that she represented the Child Support Enforcement Section of the Department of Human Resources (DHR), which is responsible for administering the child support enforcement program. She admitted her office did nothing to formally intervene in the case. The court then made the following inquiry:

COURT: Mr. Delbridge I take it then that the Attorney General's here in this case with the consent or request of the District Attorney's office.

MR. DELBRIDGE: No. Actually Mr. Ferguson is the representative of the District Attorney's Office and involved initially in this other case. I am just here.

SOTELO v. DREW

[123 N.C. App. 464 (1996)]

COURT: Is that fair to say then?

MR. FERGUSON: I believe so Your Honor although I was actually I was [sic] subpoenaed in the capacity of a witness taking [sic] the Attorney General does appear to request the assistance of the District Attorney's office.

COURT: And you are assuming that is the case here?

MR. FERGUSON: Yes sir.

COURT: Well I consider that out of the way then as far as their representation here.

By order dated 2 November 1994, Judge Aycock denied the Rule 60(b) motion to set aside Judge Ellis' order. From this order, the Attorney General appeals.

N.C. Gen. Stat. § 52A-10.1 in dealing with URESA petitions states:

It shall be the duty of the official who prosecutes criminal actions for the State in the court acquiring jurisdiction to appear on behalf of the obligee in proceedings under this Chapter. In the event of an appeal from a support order entered under this Chapter, the Attorney General shall represent the obligee.

When an out-of-state obligee (the party claiming to be owed support payments) files a URESA complaint in North Carolina, the case must be docketed in the appropriate county and the district attorney's office must be notified, as it is "the district attorney[] who appears 'on behalf of the obligee.'" *Reynolds v. Motley*, 96 N.C. App. 299, 302, 385 S.E.2d 548, 550 (1989) (quoting N.C. Gen. Stat. §§ 52A-10.1, -12). The Attorney General's office becomes involved in representing the obligee only "[i]n the event of an *appeal* from a support order entered under this Chapter." G.S. 52A-10.1 (emphasis added).

Under Article III, § 18 of the North Carolina Constitution, the General Assembly was authorized to create the Department of Justice, supervised by the Attorney General, and to enact laws defining the authority of the Attorney General. *N.A.A.C.P. v. Eure, Secretary of State*, 245 N.C. 331, 336, 95 S.E.2d 893, 897 (1957). Pursuant to this authority, the General Assembly enacted N.C. Gen. Stat. § 114-2 which prescribes the duties of the Attorney General. *N.A.A.C.P.*, 245 N.C. at 336, 95 S.E.2d at 897. Subsection 4 of this statute provides that it is the duty of the Attorney General "[t]o consult with and advise the prosecutors, *when requested by them*, in all

SOTELO v. DREW

[123 N.C. App. 464 (1996)]

matters pertaining to the duties of their office.” G.S. 114-2(4) (emphasis added). This duty to consult and advise prosecutors upon their request allows the Attorney General “to advise the prosecutors, not to completely replace them, or act instead of them, unless there is an express statutory provision authorizing the Attorney General to initiate a particular action.” *State v. Felts*, 79 N.C. App. 205, 212, 339 S.E.2d 99, 103, *disc. review denied*, 316 N.C. 555, 344 S.E.2d 11 (1986).

There is nothing in the record indicating the Wayne County District Attorney ever requested the Attorney General’s assistance in this case. Indeed, testimony at the Rule 60(b) motion hearing reveals that it was the Attorney General who called for the assistance of the district attorney. When the court asked whether the district attorney’s office had requested the Attorney General’s assistance, the assistant district attorney assigned to this case responded, “the Attorney General does appear to request the assistance of the District Attorney’s office.” The Attorney General has not shown any statutory authority which permits him to supplant the district attorney in representing plaintiff in these matters.

Rule 60(b) states that in some circumstances “[o]n motion and upon such terms as are just, the court may relieve *a party or his legal representative* from a final judgment” N.C.R. Civ. P. 60(b) (emphasis added). In *Browne v. Dept. of Social Services*, 22 N.C. App. 476, 206 S.E.2d 792 (1974) petitioner, the foster mother of two minor children, brought a habeas corpus proceeding to determine the proper custody of the children and she asked the court to treat the proceeding as a motion for review of an earlier case involving the minor children. After speculating the earlier case which petitioner sought to have reviewed was an action to terminate parental rights, this Court stated only “a party or his legal representative may seek relief from a final judgment. Petitioner was not a party, and is not the legal representative of a party, in the *former cause*.” *Id.* at 478, 206 S.E.2d at 793. (emphasis added).

Applying these same principles to the facts of this case, we note the parties in the original action are plaintiff Theresa L. Sotelo, and defendant Charles E. Drew, not the Attorney General. There is nothing in the record indicating the Attorney General was ever made *a party or the legal representative of a party* in the original matter. Instead, the associate attorney general effectively attempted to take on the role of a party to the action by inserting herself in place of the

SOTELO v. DREW

[123 N.C. App. 464 (1996)]

plaintiff. Following the 27 August 1993 consent order, the only documents appearing in the record were those filed along with the Rule 60(b) motion: (1) the notice of hearing (2) two letters from officials in the State of Maryland responding to requests which appear to have been initiated by the State of North Carolina Child Support Enforcement Division of the Department of Human Resources and (3) a short affidavit from Ms. Sotelo stating she never discussed with anyone the option of forgiving arrearages and that she filed this support order to obtain on-going child support and arrearages owed to her. There is nothing in the record indicating the Attorney General was an original party, was asked by Ms. Sotelo, the State of Maryland, or the Wayne County District Attorney to intervene as a party, to act as Ms. Sotelo's legal representative, or to serve as Ms. Sotelo's attorney. Therefore, the Attorney General's motion was improper and the trial court lacked jurisdiction to hear the matter. Unless specifically requested to assist in the matter by the district attorney, the Attorney General's role was to handle the case in the event of an *appeal*, not a Rule 60(b) motion to Set Aside Judgment.

The Attorney General argues the defendant did not properly preserve for this Court's consideration the question of whether the Attorney General had standing to bring the Rule 60(b) motion. This argument is without merit. Standing is a question of subject matter jurisdiction and as such, this Court may raise the issue on its own motion. *Union Grove Milling and Manufacturing Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478, *disc. review allowed*, 333 N.C. 578, 429 S.E.2d 577, *affirmed*, 335 N.C. 165, 436 S.E.2d 131 (1993).

Since the Attorney General was without authority to file the Rule 60(b) motion, the trial court lacked jurisdiction to hear the matter, and its judgment must be vacated. The cause is remanded for entry of an order dismissing the Attorney General's 60(b) motion.

Vacated and remanded.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I would not vacate the judgment of the trial court on the grounds that it was without subject matter jurisdiction to adjudicate the Rule

HINSON v. UNITED FINANCIAL SERVICES

[123 N.C. App. 469 (1996)]

60 motion. In my opinion, the trial court had jurisdiction. The majority's opinion is based on the holding that the Attorney General, in the filing of the Rule 60 motion, took "on the role of a party to the action." I disagree. The trial court found as a fact that the Rule 60 motion was filed by the "office of the Attorney General for the State of North Carolina, on behalf of the plaintiff," Theresa L. Sotelo. Because neither party objected to this finding of fact, this Court is bound by it. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). It therefore follows that the Attorney General was not a party to the action. As such, because there is no dispute that Theresa L. Sotelo had standing to file the Rule 60 motion, the trial court had subject matter jurisdiction to adjudicate the motion.

Whether the Attorney General had statutory authority to represent the plaintiff in the filing of the motion is not an issue properly before this Court, as neither the plaintiff nor defendant has raised this issue on appeal. N.C. R. App. P. 10.



LLOYD HINSON, PLAINTIFF V. UNITED FINANCIAL SERVICES, INC., DEFENDANT

No. COA95-459

(Filed 6 August 1996)

1. Quasi Contracts and Restitution § 13 (NCI4th)— note and deed of trust—threat of criminal prosecution—unjust enrichment inapplicable

Plaintiff failed to state a claim for restitution based on unjust enrichment where he alleged that a note and deed of trust, now paid, were procured by a threat of criminal prosecution because any restitutionary remedy would lie in contract law and not in equity.

Am Jur 2d, Damages § 55; Restitution and Implied Contracts §§ 2, 3, 14.

Threatening, instituting, or prosecuting legal action as invasion of right of privacy. 42 ALR3d 865.

Initiating, or threatening to initiate, criminal prosecution as ground for disciplining counsel. 42 ALR4th 1000.

HINSON v. UNITED FINANCIAL SERVICES

[123 N.C. App. 469 (1996)]

2. Limitations, Repose, and Laches § 38 (NCI4th)— note and deed of trust—threat of criminal prosecution—rescission for duress—beginning of limitations period

The three-year statute of limitations for plaintiff's claim for rescission of a note and deed of trust for duress based on the allegation that they were improperly procured by the threat of criminal prosecution began to run on the date the note and deed of trust were signed where plaintiff had knowledge of the wrongfulness of the transaction on that date in that he had previously been advised by an attorney that the transaction was against public policy. The payee's expectation that payments would be made in accordance with the note and its sending of late notices to the plaintiff did not constitute a continuing wrong which extended the limitations period in a fashion similar to the continuing course of treatment doctrine applicable to medical malpractice actions. N.C.G.S. § 1-52(1) and (9).

Am Jur 2d, Duress and Undue Influence § 23; Limitation of Actions § 177.

What statute applies to an action, based on duress, to recover money or property. 77 ALR2d 821.

Reliance on statute of limitations. 43 ALR3d 756.

Appeal by plaintiff from order granting summary judgment to defendant entered 15 February 1995 by Judge Dexter Brooks in Columbus County Superior Court. Heard in the Court of Appeals 31 January 1996.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff appellant.

Robinson, Bradshaw & Hinson, P.A., by J. Daniel Bishop and A. Todd Capitano, for defendant appellee.

SMITH, Judge.

Plaintiff assigns error to the trial court's grant of summary judgment for defendant on grounds that plaintiff's claims are time barred by the applicable statutes of limitation. The instant case presents the question of when applicable statutes of limitation begin to run on a note and deed of trust allegedly procured by threat of criminal prosecution, when plaintiff seeks to void said note, recover funds

HINSON v. UNITED FINANCIAL SERVICES

[123 N.C. App. 469 (1996)]

expended toward the note, and receive further damages based on defendant's conduct in procuring the note.

We find that the statutes of limitation on plaintiff's claims began to run on the date of the original injury, *viz*, when the alleged wrongful procurement of the note occurred. Thus, it is apparent that plaintiff is not entitled to recover on any of his claims.

The events giving rise to plaintiff's cause of action arose in March of 1990. At that time plaintiff's former wife, Deborah Hinson (now Chavis), was employed in Laurinburg, North Carolina as a branch manager for United Financial Services, Inc. (UFS), a consumer finance company. Deborah Hinson's job responsibilities included loan closings and approvals. At some point in her employment with UFS, Deborah Hinson began using fictitiously generated loans to cover existing loans that had become delinquent. The false loans were discovered by UFS in March of 1990. Thereafter, UFS terminated Deborah Hinson's employment, and demanded repayment of the misappropriated funds.

Discussions between UFS officials, plaintiff, and Deborah Hinson ensued. These discussions centered on Deborah Hinson's liability for the repayment of the improperly used funds, and potential criminal liability for what she had done. UFS allegedly threatened to "criminally indict" Deborah Hinson, and this threat was used as negotiating leverage to resolve the situation in UFS's favor. UFS promised the Hinsons that, if they would sign a note and deed of trust providing for repayment, no criminal charges would be brought by UFS against Deborah Hinson.

Fearing criminal charges, the Hinsons immediately sought the assistance of an attorney in Laurinburg, Kenneth S. Etheridge (Etheridge). After presentation of their predicament to the attorney, the Hinsons directed Etheridge to draft a promissory note (note) and deed of trust sufficient to satisfy the demands of UFS. Etheridge "emphatic[ally]" explained to the Hinsons "that regardless of what had transpired, [they] had no legal obligation to repay any monies, and [they] should not sign any note or deed of trust." Further, Etheridge "told them that any agreement that [the Hinsons] would enter into with [UFS] for bearing [*sic*] to bring criminal action in exchange for whatever consideration was not an enforceable document." *See, e.g., Gillikin v. Whitley*, 66 N.C. App. 694, 697, 311 S.E.2d 677, 679 (1984).

HINSON v. UNITED FINANCIAL SERVICES

[123 N.C. App. 469 (1996)]

Despite the advice of counsel, the Hinsons directed Etheridge to draft the note and deed of trust so as to avoid UFS's promise to escalate the situation into a criminal matter if no repayment occurred. The Hinsons then signed the note on 15 March 1990, obligating repayment to UFS, and recorded the accompanying deed of trust on the Hinson marital home. Then in the spring and summer of 1991, the Hinsons fell behind in their note payments. In response, UFS sent a letter urging the Hinsons to restore their account to current status and demanding payment of sums due.

Approximately three years later plaintiff moved to Whiteville, North Carolina, at which time he asked UFS to transfer its deed of trust lien to his new home. Otherwise, plaintiff would be forced to pay off the loan balance upon sale of the marital home. UFS refused. Plaintiff went ahead with the sale of the home, and with the proceeds plaintiff paid off the note and extinguished the lien on 10 June 1994. Just over one month later, on 13 July 1994, plaintiff initiated the lawsuit at the heart of the instant appeal.

In order to prevail on a summary judgment motion, the moving party (here defendant) must show either "(1) 'an essential element of plaintiff's claim is nonexistent . . . [2] plaintiff cannot produce evidence to support an essential element of his claim, or . . . [3] plaintiff cannot surmount an affirmative defense which would bar the claim.'" *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37 (quoting *Shuping v. Barber*, 89 N.C. App. 242, 244, 365 S.E.2d 712, 714 (1988)), *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). The trial court must construe all evidence in the light most favorable to the nonmoving party, allowing the nonmoving party all favorable inferences as to the facts. *Moye v. Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979).

Defendant prevailed on its motion for summary judgment because it successfully raised the affirmative defenses of the statutes of limitation. The central question on appeal is whether the trial court properly found that, as a matter of law, plaintiff's claims were time barred. Plaintiff's complaint alleges three causes of action as grounds for relief, duress, unjust enrichment, and unfair and deceptive trade practices (N.C. Gen. Stat. § 75-16 (1988)).

We note that "duress" is not, in and of itself, a proper cause of action. However, pursuant to our rules of notice pleading, we recognize plaintiff's "duress" claim as really one for rescission *based on*

HINSON v. UNITED FINANCIAL SERVICES

[123 N.C. App. 469 (1996)]

duress. See *Hinson v. Jefferson*, 24 N.C. App. 231, 237, 210 S.E.2d 498, 502 (1974). Plaintiff's cause of action for unjust enrichment is similarly flawed. It seems obvious that the cause of action plaintiff intended was for restitution based on unjust enrichment. See *Clark Trucking of Hope Mills v. Lee Paving Co.*, 109 N.C. App. 71, 74, 426 S.E.2d 288, 289 (1993).

[1] Unjust enrichment is "based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Atlantic Coast R.R. v. Highway Commission*, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966). " '[A] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' " *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56, (citation omitted), *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). "A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Id.* at 570, 369 S.E.2d at 556.

The hallmark rule of equity is that it will not apply "in any case where the party seeking it has a full and complete remedy at law." *Jefferson Standard Insurance Co. v. Guilford County*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945). The upshot of this analysis is that plaintiff's awkwardly pled equitable restitution claim is inapplicable under the facts of this case. Where, as here, there is a contract which forms the basis for a claim, "the contract governs the claim and the law will not imply a contract." *Shadrick*, 322 N.C. at 570, 369 S.E.2d at 556. Thus, plaintiff's restitutionary remedy, if there were to be one, would lie in contract law, not equity. For this reason alone, analysis of plaintiff's quasi-contract claim against defendant's affirmative defense of statute of limitation is unnecessary and improper. As a result, we consider only the continued viability of plaintiff's claims for rescission of the note and deed of trust, and plaintiff's claim for unfair and deceptive trade practices against defendant.

[2] Plaintiff's rescission claim for alleged duress is governed by N.C. Gen. Stat. § 1-52(9) (1983), which sets the statutes of limitation at three years for actions grounded in fraud or mistake. *Biesecker v. Biesecker*, 62 N.C. App. 282, 285-86, 302 S.E.2d 826, 829 (1983) (an action to void a deed for duress barred after three years where grantor knew of threats at time of signing); *Swartzberg v. Reserve Life Insurance Co.*, 252 N.C. 150, 156, 113 S.E.2d 270, 277 (1960). The *Swartzberg* Court held that § 1-52(9) is to be used " 'in [a] broad sense, to apply to all actions, both legal and equitable, where fraud is

HINSON v. UNITED FINANCIAL SERVICES

[123 N.C. App. 469 (1996)]

an element, and to all forms of fraud, including deception, imposition, *duress*, and undue influence.’ ” *Swartzberg*, 252 N.C. at 156, 113 S.E.2d at 277 (emphasis added) (citation omitted). Even assuming, *arguendo*, that strict contract principles governed the rescission claim, the same three-year limitation would apply. N.C. Gen. Stat. § 1-52(1). Finally, we note that plaintiff’s unfair and deceptive trade practice claim is subject to a four-year statute of limitation. N.C. Gen. Stat. § 75-16.2 (1994).

With the appropriate statutes of limitation so stated, plaintiff’s causes of action necessarily pivot on a determination of the date the relevant statutes of limitation began to run. In this state, speaking generally, a statute of limitation begins to run as soon as the right to sue arises. *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962). Plaintiff’s rescission claim based on duress arose at the moment of “ ‘discovery by the aggrieved party of the facts constituting the fraud or mistake.’ ” *Swartzberg*, 252 N.C. at 156, 113 S.E.2d at 276 (quoting N.C. Gen. Stat. § 1-52(9)); *Biesecker*, 62 N.C. App. 282, 285-86, 302 S.E.2d 826, 829.

When the instant plaintiff’s claims of duress are measured against this discovery rule, it is manifest that plaintiff’s claim on this score is not timely. There are at least two points at which plaintiff must have known that he had been wronged. First, plaintiff’s deposition indicates he was present at a meeting with UFS officials in March 1990, when the alleged threats of criminal prosecution were made to his (now former) wife. These threats led plaintiff and his wife to immediately seek out counsel.

Second, plaintiff’s attorney advised the Hinsons that the note and deed were against public policy, and strenuously encouraged the Hinsons to reject UFS’s terms. The Hinsons chose to disregard this advice and proceeded to sign the note and abide by its obligations. Viewed in the light most favorable to plaintiff, it is manifest that plaintiff had actual knowledge of the wrongfulness of this transaction on 15 March 1990, when the note and deed of trust were signed. Because UFS’s threat of criminal prosecution occurred prior to 15 March 1990, this potential additional wrongful act does not assist plaintiff’s argument. Since the complaint in the instant case was not filed until 13 July 1994, plaintiff’s cause of action for rescission based on duress is barred, as it was filed over four years after the wrongful act at issue.

Plaintiff’s attempt to equate the singular wrong involved in the procurement of the note, with wrongs applicable to the continued

HINSON v. UNITED FINANCIAL SERVICES

[123 N.C. App. 469 (1996)]

course of treatment doctrine in medical malpractice actions, is misplaced. *See Johnson Neurological Clinic v. Kirkman*, 121 N.C. App. 326, 330, 465 S.E.2d 32, 34 (1996) (right of action in tort arising from continuous medical treatment for same or similar injury accrues at the conclusion of that treatment). UFS's expectation that payments would be made in accordance with the note, as manifested by late notices to the Hinsons, is in no way the same as a situation "where a physician is retained to render continuous and related services, usually related to a particular affliction, [so as to be a] contract for medical services . . . deemed to be an indivisible contract . . ." *Id.* Sending a late notice is, at worst, an ill effect of the original wrong and is not a wrong in and of itself. Plaintiff's analogies to gasoline seepage, *et al.*, such as to *Wilson v. McLeod Oil*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991), are equally flawed.

Plaintiff's claim for unfair and deceptive trade practices fares no better. This Court has previously determined that a cause of action for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-16 (1994) accrues when " 'the right to institute and maintain a suit arises.' " *Barbee v. Atlantic Marine Sales & Service*, 115 N.C. App. 641, 649, 446 S.E.2d 117, 122, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994) (quoting *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962)). Otherwise put, a cause of action pursuant to § 75-16 accrues when the violation occurs. *See United States v. Ward*, 618 F.Supp. 884, 902 (E.D.N.C. 1985). As stated earlier, the latest actionable wrong attendant to this claim occurred on 15 March 1990, when plaintiff executed the note and deed of trust.

Thus, under N.C. Gen. Stat. § 75-16.2 (1994), plaintiff would have had to initiate this action within four years from 15 March 1990 to escape the perimeter of the statute of limitation. Plaintiff's complaint was not filed until 13 July 1994. Suffice it to say that plaintiff's unfair and deceptive practice claim is time barred by § 75-16.2.

As plaintiff's claims do not survive defendant's affirmative statutes of limitation defenses, the trial court's grant of summary judgment is affirmed. *Clark v. Brown*, 99 N.C. App. at 260, 393 S.E.2d at 136-37.

Affirmed.

Judges JOHNSON and JOHN concur.

ARRINGTON v. TEXFI INDUSTRIES

[123 N.C. App. 476 (1996)]

ADAM ARRINGTON, EMPLOYEE-PLAINTIFF v. TEXFI INDUSTRIES, EMPLOYER-DEFENDANT,
AND AMERICAN POLICYHOLDERS INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA95-1124

(Filed 6 August 1996)

Workers' Compensation § 230 (NCI4th)— employee earning higher wages post-injury—duties not “made work”—plaintiff's ability to perform duties—insufficiency of findings—inadequate basis for award of permanent disability benefits

The Industrial Commission erred in awarding permanent and total disability benefits to plaintiff where the evidence before the Commission was that plaintiff held a custodial position at defendant's plant; the hourly wage he received as a custodian was higher than what he earned in his pre-injury position as a chemical mixer; plaintiff failed to establish, through competent testimony, that his custodial position was “made work”; because plaintiff offered no competent evidence that the custodial position was “made work,” it represented strong if not conclusive evidence of his earning capacity; but because the Commission failed to make any findings or draw any conclusions on whether plaintiff was physically and mentally capable of performing his custodial duties, the court on appeal was unable to determine whether an adequate basis existed for the Commission's award of permanent and total disability benefits to plaintiff.

Am Jur 2d, Workers' Compensation §§ 395-399.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases. 89 ALR3d 783.

Appeal by defendants from opinion and award filed 13 July 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 May 1996.

Anderson & Anderson, by Michael J. Anderson, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Thomas W. Page and Jennifer Ingram Mitchell, for defendant-appellants.

ARRINGTON v. TEXFI INDUSTRIES

[123 N.C. App. 476 (1996)]

MARTIN, Mark D., Judge.

Defendants Texfi Industries, Inc., and American Policyholders Insurance Company (collectively defendants) appeal the North Carolina Industrial Commission's award of permanent and total disability benefits to plaintiff Adam Arrington (Arrington).

Arrington was employed by Texfi Industries (Texfi) for approximately sixteen years prior to his injury on 12 August 1988. At the time of his injury, Arrington was responsible for mixing chemicals to make sizing used to thicken yarn (chemical mixer position). Arrington sustained burns to the lower half of his body when the sizing chemicals boiled over the side of the mixing vat. On 17 August 1988 the parties executed I.C. Form 21, Agreement for Compensation for Disability, which was approved by the Commission on 12 September 1988.

On 2 January 1989 Arrington returned to light-duty work at the suggestion of Dr. H. D. Peterson, his treating physician. After attempting to return to his chemical mixer position, Arrington complained of chronic fatigue and weakness. Dr. Peterson diagnosed Arrington as suffering from neurasthenia—an affliction of unknown origin which induces a “weakness of the spirit and the body.”

Since 2 January 1989 Arrington has remained in the continuous employ of Texfi. At present, Arrington holds a custodial position which requires him to sweep, clean, empty wastebaskets, monitor machines, drive a forklift, operate a beam truck and pull beams, use a chain hoist to unload beams, cut waste yarn from beams, and perform other general custodial duties. Further, the hourly wage Arrington earns in the custodial position is higher than in his pre-injury chemical mixer position.

On 28 May 1991 defendants filed I.C. Form 28B, Insurance Carrier's Report of Compensation and Medical Paid. On 22 July 1992 Arrington filed I.C. Form 33, Request for Hearing. In an opinion and award filed 18 August 1994, Deputy Commissioner Lawrence B. Shuping, Jr., concluded Arrington was not entitled to permanent and total disability benefits. The Full Commission reversed Deputy Commissioner Shuping and awarded Arrington permanent and total disability benefits.

On appeal defendants contend the Commission erred by finding: (1) Arrington's light-duty job is not necessary to Texfi's business operations; (2) Arrington's chronic fatigue and weakness was caused by

ARRINGTON v. TEXFI INDUSTRIES

[123 N.C. App. 476 (1996)]

his burns; and (3) Arrington is physically and mentally incapable of earning his same pre-injury wages in the same or other employment. Defendants also allege Arrington provided insufficient notice of his intent to seek permanent and total disability benefits and, therefore, defendants were unprepared to present evidence at the hearing.

We consolidate defendants' assignments of error into one issue—whether Arrington is entitled to permanent and total disability benefits under section 97-29 of the Workers' Compensation Act (Act).

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1991) (emphasis added). Disability therefore refers to a diminished capacity to earn money rather than physical infirmity. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986).

To establish disability, a claimant must prove:

(1) [he] was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) [he] was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) [his] incapacity to earn was caused by [his] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). More particularly, any person claiming benefits under section 97-29 "has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to 'earn wages which . . . [he] was receiving at the time [of injury] in the same or any other employment.'" *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)) (emphasis added).

In the present case, Arrington currently holds a custodial position at Texfi. The custodial position pays an hourly wage in excess of what Arrington received as a chemical mixer, his pre-injury position. Therefore, as recognized by Deputy Commissioner Shuping, we are confronted with a factual conundrum—Arrington seeks permanent and total disability benefits even though he: (1) has been employed by Texfi since recovering from his injury; and (2) presently earns a higher hourly wage than before his injury.

ARRINGTON v. TEXFI INDUSTRIES

[123 N.C. App. 476 (1996)]

Defendants argue the custodial position is “any other employment” within the meaning of section 97-2(9) and, consequently, Arrington is not entitled to permanent and total disability benefits.

It is well settled, however, that not every position offered to a claimant is considered “any other employment” under section 97-2(9). See *Peoples*, 316 N.C. at 438-439, 342 S.E.2d at 806. Specifically, an employer may not avoid liability under the Act by creating or modifying a position “which the employee under normally prevailing market conditions could find nowhere else” *Id.* at 439, 342 S.E.2d at 806. As stated by our Supreme Court:

an employer may . . . avoid liability under the Act by offering an injured employee a job at his old wage within his ability to perform . . . only if the proffered job is . . . available generally in the market. If the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive, evidence of the employee's earning capacity.

Id. at 440, 342 S.E.2d at 807 (emphasis added). The *Peoples* holding recognizes that wages earned in “made work” are inherently unreliable indicators of an employee's actual earning capacity because the “wages may reflect not the employee's earning capacity in a competitive situation but rather a company policy which, if abrogated for any reason . . . , will force the employee into a position where he will be unable, because of his injuries, to continue to earn such wages” *Id.* at 437, 342 S.E.2d at 805 (quoting *Allen v. Industrial Commission*, 347 P.2d 710, 718 (1959)) (emphasis deleted).

In *Peoples*, plaintiff sought permanent and total disability benefits because he allegedly contracted a debilitating lung disease while working for defendant. *Id.* at 427-428, 342 S.E.2d at 800. After learning of plaintiff's illness, defendant transferred plaintiff to the supply room to minimize his exposure to dust. *Id.* at 428, 342 S.E.2d at 800. After four days in the supply room, plaintiff was hospitalized for “chest pain and breathing difficulty.” *Id.* Plaintiff did not return to work after being discharged from the hospital. *Id.* at 428, 342 S.E.2d at 801.

In an effort to employ plaintiff despite his medical limitations, defendant modified an existing position and offered it to plaintiff. *Id.* Defendant's personnel manager testified the job offered to plaintiff “has never before existed at [defendant's plant]. It was created especially for plaintiff with his physical limitations in mind.” *Id.* at

ARRINGTON v. TEXFI INDUSTRIES

[123 N.C. App. 476 (1996)]

429-430, 342 S.E.2d at 801. Dr. Thomas K. White, an expert in vocational rehabilitation and job skills, also testified he was "not aware of any job on the market today similar to [the job offered plaintiff] with the same pay scale. . . . [T]his is not really a standard job which is in existence in the labor market but that this is going to be a tailored, engineered type of job." *Id.* at 431-432, 342 S.E.2d at 802.

Based on the above detailed testimony, the Supreme Court found that defendant was the only employer who would offer plaintiff such a job opportunity. *Id.* at 439, 342 S.E.2d at 806. The Court therefore held "the job [defendant] offers plaintiff cannot be considered as evidence of plaintiff's ability to earn wages." *Id.* at 439, 342 S.E.2d at 807.

In the instant action, Arrington currently holds a custodial position at Texfi. The hourly wage he receives as a custodian is higher than what he earned in his pre-injury position as a chemical mixer. Defendants contend this establishes Arrington's wage earning capacity is the same as, if not better than, before his injury.

The Commission found, however, "although [Texfi] may well be attempting to accommodate [Arrington's] chronic weakness and fatigue, the lighter work that [Arrington] does on the premises is non-productive work that is not necessary to [Texfi's] smooth operation." This finding essentially characterizes Arrington's custodial position at Texfi as the kind of "made work" which "cannot be considered as evidence of plaintiff's ability to earn wages." *Id.* at 439, 342 S.E.2d at 807. Therefore, as the "Commission's findings of fact are binding on appeal when supported by competent evidence," *Lackey v. R. L. Stowe Mills*, 106 N.C. App. 658, 661, 418 S.E.2d 517, 519, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 150 (1992), it follows we must determine whether the present record supports the Commission's finding that Arrington's custodial position is "made work."

Arrington's custodial duties include sweeping, cleaning, emptying wastebaskets, monitoring machines, driving a forklift, operating a beam truck, using a chain hoist to unload beams, and cutting waste yarn from beams. To support his claim this is "made work," Arrington directs this Court to Dr. Peterson's deposition testimony. Although, at first blush, Dr. Peterson's statement that the custodial position is "make-do work" appears dispositive, a closer reading of the record discloses two fatal flaws.

First, Dr. Peterson's characterization of the custodial position as "make-do work" was not based upon the availability of the custodial

ARRINGTON v. TEXFI INDUSTRIES

[123 N.C. App. 476 (1996)]

position on the open market, but rather was apparently premised upon Arrington's subjective feelings of embarrassment and inadequacy when his physical incapacity forced him to refrain from heavy labor. The Act, however, provides compensation only for objective and quantifiable loss in one's ability to earn wages. *Peoples*, 316 N.C. at 434-435, 342 S.E.2d at 804.

Second, unlike the plaintiff's expert in *Peoples*, we note Dr. Peterson is a plastic surgeon with special expertise in burn treatment—not an industrial engineer; a vocational rehabilitation and job skills expert; or an individual with expertise in, or knowledge of, the yarn industry as a whole, or Texfi in particular. As Dr. Peterson has no special knowledge, training, education, or skill regarding employment within Texfi or the yarn industry, his characterization of the custodial position as "make-do work" is immaterial to either the legal or factual determination of whether the custodial position is "made work." *See id.* at 438, 342 S.E.2d at 806 (emphasizing testimony about "make work" nature of plaintiff's job provided by defendant's personnel manager and a vocational rehabilitation and job skills expert). *See also* N.C. Gen. Stat. § 8C-1, Rule 702 (1992). Therefore, under *Peoples*, Arrington failed to establish, through competent testimony, that his custodial position is "made work."

Because Arrington proffered no competent evidence the custodial position is "made work," it represents "strong, if not conclusive, evidence of the employee's earning capacity." *Peoples*, 316 N.C. at 440, 342 S.E.2d at 807. We note, however, the Commission failed to make any findings or draw any conclusions on whether or not Arrington is physically and mentally capable of performing his custodial duties. *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (entitled to benefits if physically or mentally incapable of working). "This Court is therefore unable to determine whether adequate basis exists, either in fact or law, for the Commission's award." *Hilliard*, 305 N.C. at 596-597, 290 S.E.2d at 684.

Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and LEWIS concur.

SYKES v. KEILTEX INDUSTRIES, INC.

[123 N.C. App. 482 (1996)]

RONALD SYKES, PLAINTIFF V. KEILTEX INDUSTRIES, INC., FORMERLY KEILTRONIX
INCORPORATED, DEFENDANT

No. COA95-1084

(Filed 6 August 1996)

1. Torts § 12 (NCI4th)— release effective as general release—no fraud of mistrial mistake

A release executed by plaintiff and a representative for his employer and a supervisor of his employer as a result of mediation was a valid general release which by its terms unambiguously released defendant, manufacturer of a control system on machinery which malfunctioned and caused injury to plaintiff, from the liability charged in plaintiff's complaint, constituting a bar to plaintiff's claim against defendant. There was no merit to plaintiff's claim that execution of the release resulted from fraud or mutual mistake, or that defendants were not third-party beneficiaries to the release and as such should not be released from liability.

Am Jur 2d, Release §§ 18, 20, 55, 60.

Right of action for fraud, duress, or the like, causing instant plaintiff to release cause of action against third person. 58 ALR2d 500.

Avoidance of release of personal injury claims on ground of fraud or mistake as to extent or nature of injuries. 71 ALR2d 82.

Tortfeasor's general release of cotortfeasor as affecting former's right to contribution against cotortfeasor. 34 ALR3d 1374.

2. Torts § 30 (NCI4th)— motion to amend answer not granted—summary judgment properly allowed

The trial court did not err in granting summary judgment for defendant based upon the affirmative defense of release because the court never granted defendant's motion to amend its answer to include the defense of release, since defendant learned of the release through discovery and initially raised the defense of release in its first motion for summary judgment, and both parties were aware of the defense at the time of the filing of defendant's second motion for summary judgment.

SYKES v. KEILTEX INDUSTRIES, INC.

[123 N.C. App. 482 (1996)]

Am Jur 2d, Job Discrimination § 2545; Pleading § 307; Summary Judgment § 23.

Amendment of pleading before trial with respect to amount or nature of relief sought as ground for relief. 56 ALR2d 650.

3. Pleadings § 395 (NCI4th)— answer to amended complaint—allowance of belated answer

The trial court did not err in denying plaintiff's motion to strike defendant's answer to plaintiff's amended complaint and its third-party complaint, though they were not timely filed, since the trial court acted within its discretion and in the interests of justice, without any prejudice to plaintiff, in allowing defendant to file an answer to plaintiff's amended complaint more than thirty days after the time permitted in N.C.G.S. § 1A-1, Rule 15.

Am Jur 2d, Pleading § 356.

Appeal by plaintiff from order entered 15 May 1995 by Judge Joe Freeman Britt in Robeson County Superior Court. Heard in the Court of Appeals 5 June 1996.

Smith, Follin & James, L.L.P., by Norman B. Smith and Margaret Rowlett, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by John Brem Smith, for defendant-appellee.

JOHNSON, Judge.

The essential facts of this case are uncontroverted and are as follows. On 8 January 1991, during and in the course of employment with Sanfatex, Inc., plaintiff Ronald Sykes was injured when contents of a machine he was operating spewed out and burned over ninety percent (90%) of his body. The control system for the machine had been designed, manufactured and started-up by defendant Keiltex Industries, Inc. (formerly Keiltronix Incorporated). Accordingly, plaintiff instituted this action for personal injuries, alleging negligence and breach of the warranties of merchantability and fitness for a particular purpose on defendant's part. Plaintiff also filed lawsuits against others, including Sanfatex, his employer, and Tommy Chong, a Sanfatex supervisor. That action, *Sykes v. Sanfatex, Inc.*, No. 92CVS03139, however, was resolved through mediation. Notably, it is a general release, executed as a result of the mediation between

SYKES v. KEILTEX INDUSTRIES, INC.

[123 N.C. App. 482 (1996)]

plaintiff and Mr. John Brem Smith, representative of Sanfatex and Tommy Chong, that is the crux of the case *sub judice*.

After plaintiff filed his complaint on 9 March 1993, defendant filed its answer on 11 June 1993. Subsequently, plaintiff was permitted by an order entered 12 December 1994 to amend his complaint. Defendant, thereafter, filed a motion for summary judgment, based upon the 3 October 1994 release executed by plaintiff. This motion was denied. On 3 February 1995, defendant filed both an answer to plaintiff's amended complaint and a third-party complaint against Sanfatex and Tommy Chong. Plaintiff then filed a motion to strike defendant's answer to the amended complaint and third-party complaint as untimely on 27 February 1995. This motion was subsequently denied. Third-party defendants Sanfatex and Tommy Chong made a motion to dismiss defendant's third-party complaint against them on 11 April 1994. In response, defendant filed a motion for leave to amend its third-party complaint and a second motion for summary judgment on 1 May 1995. Again, defendant pled release of plaintiff's claims against defendant corporation. Plaintiff's motion to strike defendant's answer and third-party complaint was denied and defendant's motion to amend its third-party complaint was allowed, but third-party defendants' motion to dismiss defendant's third-party complaint was allowed on 15 May 1994. The trial court, at the same time, however, granted defendant's motion for summary judgment and dismissed plaintiff's action. Plaintiff and defendant/third-party plaintiff appealed. Defendant/third-party plaintiff's appeal was dismissed by this Court on 29 November 1995.

[1] On appeal, plaintiff first assigns as error the trial court's grant of defendant's second motion for summary judgment. Plaintiff argues that he did not release his claims against defendant when he released Sanfatex and Mr. Chong. Specifically, plaintiff contends that (1) mutual mistake prevents the release from releasing plaintiff's claim against defendant, and (2) alternatively, defendant was not a third party beneficiary to that release.

"Summary judgment is appropriate only when there is no genuine issue of material fact to be resolved, thereby entitling the movant to judgment as a matter of law." *Northington v. Michelotti*, 121 N.C. App. 180, 182, 464 S.E.2d 711, 713 (1995) (citing *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986)). The moving party bears the burden of establishing the lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*,

SYKES v. KEILTEX INDUSTRIES, INC.

[123 N.C. App. 482 (1996)]

313 N.C. 488, 329 S.E.2d 350 (1985). Once the moving party meets its burden, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). For the reasons discussed herein, we find that plaintiff failed to show genuine issue of material fact in this case, and thus we conclude that the trial court properly allowed defendant's motion for summary judgment.

Through mediation with Sanfatex and Mr. Chong, plaintiff executed a general release which provides,

Ronald Sykes, the undersigned, being of lawful age, for the consideration of the promises contained in the Memoranda of Agreement executed September 8, 1994, does hereby and for his heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Tommy Chong, Sanfatex, Inc., Federal Insurance Company, and Hartford, their agents, servants, successors, heirs, executors, administrators *and all other persons, firms, corporations, associations or partnerships* of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen, personal injury and the consequences thereof resulting or to result from the incident that occurred on or about the 8th day of January, 1991, at the Sanfatex, Inc. plant, in Red Springs, Robeson County, North Carolina, that formed the basis of the action 92-CVS-03139 filed in Superior Court, Robeson County. (emphasis added).

We hold that this release is a valid general release which by its terms unambiguously releases defendant from the liability charged in plaintiff's complaint, constituting a bar to plaintiff's claim against defendant in the instant action. *See Battle v. Clanton*, 27 N.C. App. 616, 220 S.E.2d 97 (1975), *disc. review denied*, 289 N.C. 613, 223 S.E.2d 391 (1976) (granting full effect to express terms in a release that provided for discharge and release of all other tortfeasors from all other claims).

Plaintiff correctly avers that a release is subject to avoidance by a showing that its execution resulted from fraud or mutual mistake. *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723

SYKES v. KEILTEX INDUSTRIES, INC.

[123 N.C. App. 482 (1996)]

(1981). The phrase "mutual mistake" has been previously defined by the North Carolina Supreme Court as "a mistake common to all the parties to a written instrument . . . [which] usually relates to a mistake concerning its contents or its legal effect." *Hubbard and Co. v. Horne*, 203 N.C. 205, 208, 165 S.E. 347, 349 (1932). As a mutual mistake is a mistake indigenous to all parties involved, a critical element for a binding agreement's existence—mutual assent—is absent; and as such, no binding agreement exists, so as to affect any parties' interest thereby. *Cunningham*, 51 N.C. App. at 270, 276 S.E.2d at 723. We find that plaintiff, however, has failed to show evidence that a mutual mistake existed concerning the contents or the legal effect of the release at issue.

Plaintiff relies heavily on *Cunningham*, but the facts of the instant case are readily distinguishable from those of that case. In *Cunningham*, the Court found that the plaintiff alleged facts that

would permit a finding that [the plaintiff] and [the insurance adjuster, the other party to the release,] agreed and intended to release only [plaintiff's husband]. The document signed contained language contrary to this mutual agreement and intention in that by its terms it released other joint tortfeasors as well as [plaintiff's husband]. It therefore failed to achieve the result which could be found to have been agreed to and intended by both parties.

51 N.C. App. at 273, 276 S.E.2d at 726. Therein, facts were alleged showing that the parties to the release intended the scope of the release to be limited, in that they intended to release the claims against an exclusive party, the plaintiff's husband. Because the release was actually general in scope, the Court found the existence of mutual mistake. *Cunningham*, 51 N.C. App. 264, 276 S.E.2d 718.

Like the release in *Cunningham*, the release in the instant case is general in scope, releasing plaintiff's claims against Sanfatex, Chong and "all other persons, firms, corporations, associations or partnerships." Unlike the plaintiff in *Cunningham*, however, plaintiff in this case has failed to present evidence to show that the other party to the release, Mr. Smith, intended the release at issue to have a limited scope. Plaintiff contends that Mr. Smith had a limited intent, to protect his clients, but plaintiff has not shown that Mr. Smith had the intent to execute a limited release—one releasing *only* his clients, while retaining plaintiff's right to sue other parties. The fact that Mr.

SYKES v. KEILTEX INDUSTRIES, INC.

[123 N.C. App. 482 (1996)]

Smith's exclusive intent was to protect his clients, does not necessitate that Mr. Smith's intent was to protect his clients exclusively. If incidentally the release also released defendants, Mr. Smith's intent still would have been fulfilled. Accordingly, we find no mutual mistake herein, as Mr. Smith's intent and the content and legal effect of the release coincide.

In addition, plaintiff's argument to the effect that defendants are not third party beneficiaries to the 3 October 1994 release, and as such, should not be released from liability, is also without merit. As we have found previously, "a comprehensively phrased 'general release,' in the absence of proof of contrary intent, is usually held to discharge *all* claims . . . between the parties." *McGladrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 92 N.C. App. 708, 710-11, 375 S.E.2d 689, 691 (citing *Merrimon v. Telegraph Co.*, 207 N.C. 101, 176 S.E. 246 (1934)), *disc. review denied*, 324 N.C. 433, 379 S.E.2d 243 (1989).

[2] Plaintiff also assigns as error the trial court's grant of summary judgment since the court never granted defendant's motion to amend its answer to include the affirmative defense of release. Plaintiff contends that as defendant did not set forth this affirmative defense in either its answer to his complaint or its answer to his amended complaint, this defense was not available for use in support of defendant's motion for summary judgment. We find this argument to be without merit.

It is well-settled that unpled affirmative defenses may be heard for the first time on motion for summary judgment, even though not asserted in the answer, where both parties are aware of the defense. *Gillis v. Whitley's Discount Auto Sales*, 70 N.C. App. 270, 319 S.E.2d 661 (1984). In the instant case, the facts tend to show that defendant corporation learned of the existence of the release executed by plaintiff through discovery. In fact, defendant corporation initially raised the defense of release in its first motion for summary judgment filed 2 December 1994. As both parties were aware of the defense at the time of the filing of defendant's second motion for summary judgment, the trial court did not err in entertaining defendant's motion for summary judgment based upon the unpled affirmative defense of release.

[3] Finally, plaintiff assigns as error the trial court's denial of his motion to strike defendant's answer and third-party complaint since

SYKES v. KEILTEX INDUSTRIES, INC.

[123 N.C. App. 482 (1996)]

these pleadings were not timely filed. Plaintiff contends that the trial court committed reversible error when it failed to strike defendant's answer and third-party complaint since it was not filed within the appropriate time deadlines, was filed without leave of the court, and would have the effect of delaying the trial in this matter. We cannot agree.

First, we note that denial of a plaintiff's motion to strike an amended answer is tantamount to permitting a defendant to file an amended answer. *Motors, Inc. v. Allen*, 20 N.C. App. 445, 201 S.E.2d 513 (1974). Further, this Court has found in *Halsey Co. v. Knitting Mills*, that in the interests of justice, a defendant should be entitled to amend his answer to meet the contents of the new complaint when the complaint is amended. 38 N.C. App. 569, 248 S.E.2d 342 (1978).

Additionally, Rule 6(b) of the North Carolina Rules of Civil Procedure vests a trial judge with great discretion to enlarge the time allowed for the performance of an act. N.C. Gen. Stat. § 1A-1, Rule 6(b) (1990). After the expiration of a specified period, a trial judge may in his discretion, *sua sponte* or upon motion of a party, allow an act to be done where the failure to act was the result of excusable neglect. *See id.*; *Hubbard v. Lumley*, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

In the instant case, the trial court, in denying plaintiff's motion to strike, allowed defendant to file an answer to plaintiff's amended complaint more than thirty (30) days after the time permitted in Rule 15 of the North Carolina Rules of Civil Procedure. As we find that the trial court acted within its discretion and in the interests of justice, without any prejudice to plaintiff, its ruling will not be disturbed on appeal.

In light of the foregoing, the trial court's decision is affirmed.

Affirmed.

Judges LEWIS and MARTIN, MARK D. concur.

HARTFORD UNDERWRITERS INS. CO. v. BECKS

[123 N.C. App. 489 (1996)]

HARTFORD UNDERWRITERS INSURANCE COMPANY, PLAINTIFF, v. BERRIEN BECKS, JR., ADMINISTRATOR OF THE ESTATE OF KATHLEEN E. LUCAS AND THE ESTATE OF JAMES G. LUCAS, SR., AND JAMES G. LUCAS, JR., DEFENDANTS

No. COA94-1369

(Filed 6 August 1996)

Insurance § 527 (NCI4th)— fraud by policyholders in procurement of policy—minimum liability coverage absolute—UIM coverage not absolute

Since the minimum liability coverage of \$25,000/\$50,000 mandated by the Financial Responsibility Act becomes “absolute” upon the occurrence of injury or damage, the trial court erred in ordering rescission of the automobile policy *in toto* based upon the jury’s finding of fraud by the insured decedents; however, because any liability coverage in excess of the statutory minimum was void *ab initio* in consequence of the jury’s determination of fraud on the part of the policyholders, no UIM coverage in the policy was required or mandated by N.C.G.S. § 20-279.21(b)(4), the UIM provisions did not become absolute at the time of loss, and the successful defense of fraud insulated plaintiff against defendants’ claim to \$700,000 UIM coverage.

Am Jur 2d, Automobile Insurance §§ 35, 37, 449; Insurance § 141.

Judgment avoiding indemnity or liability policy for fraud as barring recovery from insurer by or on behalf of third person. 18 ALR2d 891.

Fraud, false swearing, or other misconduct of insured as barring recovery on property insurance by innocent coinsured. 24 ALR3d 450.

Appeal by defendants from judgment entered 9 May 1994 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 13 September 1995.

Thompson, Barefoot & Smyth, L.L.P., by Theodore B. Smyth, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by Stephen D. Coggins, Regina J. Wheeler, and Kiah T. Ford, IV, for defendants-appellants.

HARTFORD UNDERWRITERS INS. CO. v. BECKS

[123 N.C. App. 489 (1996)]

JOHN, Judge.

In this action for declaratory judgment regarding UIM coverage, defendants primarily assign error to the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict. We find defendants' arguments unpersuasive.

Pertinent facts and procedural information are as follows: On 16 December 1989 in Volusia County, Florida, Kathleen E. Lucas (Mrs. Lucas) and James G. Lucas, Sr. (Mr. Lucas), were fatally injured in an automobile collision while passengers in a 1966 Oldsmobile owned by Mr. Lucas. The vehicle was operated by the Lucas' son, defendant James G. Lucas, Jr., who also suffered severe bodily injuries. At that time, the Oldsmobile was insured under a policy of insurance (the policy) issued by plaintiff Hartford Underwriters Insurance Company and which provided coverage in the amount of \$100,000/\$300,000. Following exhaustion of the minimum liability coverage on the other vehicle involved in the collision, underinsured motorist (UIM) claims were submitted to plaintiff on behalf of the defendants.

Plaintiff subsequently initiated the instant declaratory judgment action seeking a determination that no UIM coverage was available to defendants under the policy. Plaintiff later amended its complaint to allege a claim for rescission on grounds Mr. and Mrs. Lucas had intentionally misrepresented material facts concerning, *inter alia*, their state of residence, in procuring the policy.

On 24 January 1994, the trial court granted defendants' motion for partial summary judgment on the issues raised in the original complaint and entered an Order decreeing that

in the event that a verdict is entered or a ruling . . . is made . . . [the] policy . . . was in full force and effect as of December 16, 1989, and not subject to rescission on the [fraud] grounds set forth in the Amended Complaint, then this Court rules . . . that: . . . [d]efendants are entitled to elect UIM coverage . . . equal to the liability limits of \$100,000 per person, \$300,000 per accident; . . . and stacked for each of the three vehicles covered by the Policy to provide \$300,000 to each of the estates of James Lucas, Sr. and Kathleen Lucas.

At trial, the sole issue submitted to the jury was as follows:

Did Mr. or Mrs. Lucas, Sr. intentionally and fraudulently make any material misrepresentation to Hartford or conceal a material fact

HARTFORD UNDERWRITERS INS. CO. v. BECKS

[123 N.C. App. 489 (1996)]

from Hartford on which Hartford reasonably relied in providing coverage to them?

Following the jury's affirmative response, the trial court entered judgment 9 May 1994 rescinding the policy and also denied defendants' motion for judgment notwithstanding the verdict. Defendants filed timely notice of appeal.

The primary issue raised by defendant's appeal is whether an insurer may deny UIM coverage based upon intentional and fraudulent misrepresentations or concealment by an insured in procurement of an automobile liability insurance policy.

Defendants argue that

once a covered loss occurs, required UIM coverage cannot be defeated for any reason, due to the FRA's [The Motor Vehicle Safety and Financial Responsibility Act of 1953] abrogation of [an] insurer's common law rights of retroactive rescission.

Plaintiff responds that the FRA writes UIM coverage only into policies providing liability coverage in excess of the \$25,000 per person/\$50,000 per accident minimum limits. As a consequence, plaintiff continues, upon a finding of fraud by an insured, the insurer may rescind *ab initio* policy provisions affording coverage greater than the minimum amount mandated by the FRA, and thus UIM coverage in excess of the minimum liability amounts would not be available. We agree.

The version of the FRA applicable to the instant action contained the following relevant provisions:

(b) Such owner's policy of liability insurance:

(4) Shall . . . provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) of this section [\$25,000/\$50,000] and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy.

. . . .

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

HARTFORD UNDERWRITERS INS. CO. v. BECKS

[123 N.C. App. 489 (1996)]

(1) Except as hereinafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; . . . no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

. . . .

(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this Article.

N.C.G.S. § 20-279.21(b)(4), (f), (h) (1987).

The issue herein is one of first impression, and we therefore must ascertain from the statutory language whether the General Assembly intended UIM coverage to survive finding of an insured's fraudulent and intentional misrepresentations in obtaining the liability insurance policy. *See Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (" 'cardinal principle of statutory construction is that the intent of the legislature is controlling,' " and may be ascertained from phraseology of statute, nature and purpose of the legislation, and consequences which would follow construction one way or the other (citations omitted)).

Protection of innocent victims who may be injured by financially irresponsible motorists has repeatedly been held to be the fundamental purpose of the FRA. *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 493, 467 S.E.2d 34, 41 (1996). This purpose is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection. *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 224-25, 376 S.E.2d 761, 763 (1989). *See also Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (the FRA is "remedial statute [which must be] liberally construed so that the beneficial purpose intended by its enactment may be accomplished.") Notwithstanding, it is also our well-established duty to avoid interpretation of the FRA in a manner which would result in "injustice" or produce "absurd consequences," particularly when "the statute may reasonably be otherwise consistently construed with the intent of the act." *Mabe*, 342 N.C. at 494, 467 S.E.2d at 41 (citations omitted).

Both parties cite *Odum v. Nationwide Mutual Ins. Co.*, 101 N.C. App. 627, 401 S.E.2d 87 (1991), as authority for their diverging con-

HARTFORD UNDERWRITERS INS. CO. v. BECKS

[123 N.C. App. 489 (1996)]

tentions concerning interpretation of the statutory provisions at issue. The question in *Odum* was

whether the insurer on an automobile liability policy can avoid liability after an injury has occurred on the ground that the policy was procured by the insured's deliberate and material misrepresentations on the application.

Odum, 101 N.C. App. at 631, 401 S.E.2d at 89. This Court ruled the General Assembly had addressed such a circumstance in G.S. § 20-279.21(f)(1), wherein it specified

the liability of the insurance carrier with respect to the insurance *required* by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs.

Id. at 632, 401 S.E.2d at 91 (emphasis altered). Therefore, as to coverage *required* by the FRA, fraud in an application for motor vehicle liability insurance is not a defense to the insurer's liability once injury has occurred. *Id.* at 634, 401 S.E.2d at 91. However,

as to any coverage in excess of the statutory minimum, the insurer is not precluded by statute or public policy from asserting the defense of fraud. Such a defense, if successful, would insulate the insurer against liability as to both the insured . . . and the injured third party.

Id. at 635, 401 S.E.2d at 92 (emphasis omitted).

Under *Odum*, therefore, the minimum liability coverage of \$25,000/\$50,000 mandated by the FRA becomes "absolute" upon the occurrence of injury or damage, G.S. § 20-279.21(f)(1), *id.* at 632, 401 S.E.2d at 91. Accordingly, we conclude the trial court erred by ordering rescission of the policy *in toto* based upon the jury's finding of fraud by Mr. and Mrs. Lucas. However, the dispositive issue herein is whether \$700,000 UIM coverage in the policy was "*required* by" the FRA, *Odum*, 101 N.C. App. at 634, 401 S.E.2d at 91, and therefore recoverable notwithstanding the fraud of Mr. and Mrs. Lucas.

Contrary to defendants' suggestion that UIM coverage is "required" or "deemed mandatory" in *all* liability policies, thereby effectively and totally precluding an insurer's retroactive rescission pursuant to G.S. § 20-279.21(f)(1), our Courts have consistently interpreted G.S. § 20-279.21(b)(4), *supra.*, to write UIM coverage into policies by statutory mandate, subject to the insured's rejection, "only

HARTFORD UNDERWRITERS INS. CO. v. BECKS

[123 N.C. App. 489 (1996)]

if the policyholder has liability insurance in excess of the minimum statutory requirement” *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 147, 400 S.E.2d 44, 50 (1991). *See also Hendrickson v. Lee*, 119 N.C. App. 444, 449-50, 459 S.E.2d 275, 278-79 (1995); and *Hollar v. Hawkins*, 119 N.C. App. 795, 797, 460 S.E.2d 337, 338 (1995)(because “the policy provided only the minimum statutorily required coverage of \$25,000 per person/\$50,000 per accident, the policy was not required to provide UIM coverage under N.C. Gen. Stat. § 20-279.21(b)(4)”).

It therefore follows that because “any [liability] coverage in excess of the statutory minimum [\$25,000/\$50,000],” *Odum*, 101 N.C. App. at 635, 401 S.E.2d at 92 (emphasis omitted), was void *ab initio* in consequence of the jury’s determination of fraud on the part of Mr. and Mrs. Lucas, no UIM coverage in the policy was required or mandated by G.S. § 20-279.21(b)(4). *See Smith*, 328 N.C. at 147, 400 S.E.2d at 50, and *Hollar*, 119 N.C. App. at 797, 460 S.E.2d at 338. As a result, the UIM provisions contained in the policy did not “become absolute” at the time of loss, G.S. § 20-279.21(f)(1), but rather constituted “coverage in excess of the statutory minimum, [and thus] [plaintiff] [was] not precluded by statute or public policy from asserting the defense of fraud.” *Odum*, 101 N.C. App. at 635, 401 S.E.2d at 92 (emphasis omitted). Because this defense was ultimately successful, it effectively “insulate[d] [plaintiff]” against defendants’ claim to \$700,000 UIM coverage. *See id.*

We believe the foregoing interpretation and consequential resolution to be both “fair” and “within the spirit of *Odum*,” as plaintiff contends. Significantly, it also avoids the “injustice” and “absurd consequences,” *see Mabe*, 342 N.C. at 494, 467 S.E.2d at 41, which would result if defendants were allowed recovery of \$700,000 UIM coverage on behalf, *inter alia*, of Mr. and Mrs. Lucas, despite the jury verdict of fraud by the couple, while, under *Odum*, the policy would have provided no more than \$25,000/\$50,000 liability coverage to an innocent third party victim of the negligence of Mr. and Mrs. Lucas. *See Odum*, 101 N.C. App. at 635, 401 S.E.2d at 92 (successful fraud defense “would insulate insurer against liability as to both the insured . . . and the [innocent] injured third party”).

We also summarily reject defendants’ remaining contention that the trial court erred by allowing into evidence property tax records of Mr. and Mrs. Lucas. Assuming *arguendo* defendants’ objection to admission of this evidence has not been waived, *see Beaver v.*

STATE v. CREASON

[123 N.C. App. 495 (1996)]

Hampton, 106 N.C. App. 172, 177, 416 S.E.2d 8, 11 (1992) ("it is not sufficient to simply file a pretrial motion *in limine* to exclude evidence which the trial judge has not heard," but "to preserve for appeal matter underlying a motion *in limine*, the movant must make at least a general objection when the evidence is offered at trial"), we find the records were relevant to the question of the residence of Mr. and Mrs. Lucas as it pertained to plaintiff's claim of fraud. *See* N.C.R. Evid. 401.

Based on the foregoing, the judgment of the trial court ordering rescission of provisions in the policy for UIM coverage and liability coverage in excess of the statutory minimum is affirmed; however, the judgment of rescission *in toto* is reversed. As liability coverage is not at issue herein, no remand is necessary to preserve defendant's rights. Having resolved this appeal in favor of plaintiff, we decline to address its remaining arguments.

Affirmed in part; reversed in part.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. RAYMOND CHARLES CREASON

No. COA95-913

(Filed 6 August 1996)

1. Criminal Law § 1286 (NCI4th)— previous habitual felon conviction—subsequent habitual felon conviction—same predicate offenses—no double jeopardy

There was no merit to defendant's contention that because he was previously convicted as a habitual felon, a second conviction as a habitual felon based partially upon the same predicate offenses constituted double jeopardy, since the North Carolina Supreme Court has previously held that once an individual who has already attained the status of a habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being a habitual felon.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 5.

STATE v. CREASON

[123 N.C. App. 495 (1996)]

2. Narcotics, Controlled Substances, and Paraphernalia § 207 (NCI4th)— controlled substance tax assessed—subsequent conviction on drug charges—no double jeopardy

Conviction on the drug charges for which defendant was indicted in this case following the assessment of the controlled substance tax on the drugs in his possession at the time of the search of his residence did not constitute double punishment for the same offenses in violation of the Double Jeopardy Clause, since the North Carolina Controlled Substance Tax did not contain unusual features which would mark it as a punitive sanction rather than a tax.

Am Jur 2d, Drugs and Controlled Substances § 192.**3. Evidence and Witnesses § 627 (NCI4th)— motion to suppress—failure to file affidavit—right to seek suppression waived**

Because defendant failed to file an affidavit to support his motion to suppress, he waived his right to seek suppression on constitutional grounds of the evidence seized from his apartment pursuant to a search warrant.

Am Jur 2d, Motions, Rules and Orders § 13.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters. 63 ALR3d 311.

4. Criminal Law § 1286 (NCI4th)— habitual felon indictment—questioning validity of original conviction—impermissible collateral attack

When appealing the use of a prior conviction as a partial basis for a habitual felon indictment, inquiries are permissible only to determine whether the State gave defendant proper notice that he was being prosecuted for some substantive felony as a recidivist, pursuant to the procedure provided in N.C.G.S. § 14-17.3, and questioning the validity of the original conviction is an impermissible collateral attack.

Am Jur 2d, Habitual Criminals and Subsequent Offenders § 5.

STATE v. CREASON

[123 N.C. App. 495 (1996)]

Appeal by defendant from judgment entered 26 January 1995 by Judge William Z. Wood, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 15 April 1995.

Attorney General Michael F. Easley, by Associate Attorney General, Teresa L. Harris, for the State.

Carlyle Sherrill for defendant appellant.

SMITH, Judge.

Defendant was convicted of possession of marijuana with intent to sell and deliver, possession of cocaine with intent to sell and deliver, and knowingly maintaining a dwelling to keep/sell marijuana. After the jury found defendant guilty of the above charges, they were then asked to determine whether defendant was a habitual felon. Defendant was found to be a habitual felon and appealed his convictions to this Court. The facts leading to defendant's arrest and conviction will be discussed only to the extent necessary to understand defendant's assignments of error.

[1] In his first assignment of error, defendant contends the trial court erred by failing to dismiss the habitual felon indictment. Defendant argues that, because he was previously convicted as a habitual felon based upon the same predicate offenses, a second conviction as a habitual felon constituted Double Jeopardy.

Initially, we note that defendant failed to include the first habitual felon indictment in the record and has therefore made no showing that the two habitual felon convictions of which he complains were based upon the same predicate offenses. Defendant failed to comply with Rule 9(a)(3)(i) (1996) of the Rules of Appellate Procedure, thus subjecting this assignment of error to dismissal. However, even if the record in this case were complete, the issue brought forward by defendant has been squarely decided by this Court in *State v. Smith*, 112 N.C. App. 512, 517, 436 S.E.2d 160, 162 (1993). In that case, the defendant argued that "once certain underlying convictions are used to convict an individual as an habitual felon, those same convictions may not be used again to enhance another conviction." *Id.* Disagreeing with defendant's argument, the Court held:

[T]he Supreme Court described the habitual felon process in *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977), by stating once an individual "who has already attained the status of an habitual felon is indicted for the commission of another felony, that per-

STATE v. CREASON

[123 N.C. App. 495 (1996)]

son may then be also indicted in a separate bill as being an habitual felon." This implies that being an habitual felon is a status, that once attained is never lost. If the legislature had wanted to require the State to show proof of three new underlying felonies before a new habitual felon indictment could issue, then the legislature could have easily stated such. We will not rewrite the statute.

Id. As the argument raised by defendant in the instant case has been previously addressed by this Court and held to have no merit, this assignment of error is overruled.

[2] In his second assignment of error, defendant contends the trial court erred in failing to dismiss all of the indictments against him in this case on the ground that conviction on those charges constitutes Double Jeopardy. Defendant's residence was searched on 4 September 1992 in connection with the above listed drug offenses. Pursuant to the North Carolina Controlled Substance Tax Act, N.C. Gen. Stat. §§ 105-113.105 to 105-113.112 (1989), a notice of controlled substance tax assessment was issued to defendant by the North Carolina Secretary of Revenue on 8 September 1992. The Department of Revenue executed on a judgment against defendant on 8 September 1992. Defendant's vehicle was sold on 20 November 1992, in partial satisfaction of the judgment against him. Defendant was arrested on true bills of indictment on 3 May 1993 and tried on the underlying criminal charges on 24 January 1995.

Defendant, relying on the United States Supreme Court opinion, *Dept. of Revenue v. Kurth Ranch*, 511 U.S. —, 128 L.Ed.2d 767 (1994), maintains that conviction on the drug charges for which he was indicted in this case, following the assessment of the controlled substance tax on the drugs in his possession at the time of the search of his residence, constitutes double punishment for the same offenses in violation of the Double Jeopardy Clause.

This issue has recently been addressed by this Court in *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996). In that case the majority held that unlike the Montana controlled substance tax reviewed by the United States Supreme Court in *Kurth Ranch*, the North Carolina Controlled Substance Tax did not contain unusual features which marked it as a punitive sanction rather than a tax. The majority in *Ballenger* held that, because the North Carolina tax did not contain the same punitive characteristics as the Montana tax, it did not rise to the level of a second punishment violative of the

STATE v. CREASON

[123 N.C. App. 495 (1996)]

Double Jeopardy Clause. We note that the instant case involves the Controlled Substance Tax Act as it existed in *Ballenger*. That Act was later amended by repeal of some statutes and addition or modification of others. Though this panel was divided in *Ballenger*, all members of this Court are now bound by the majority opinion in that case. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 382, 379 S.E.2d 30, 36 (1989). Accordingly, we hold that conviction following assessment of the controlled substance tax did not constitute Double Jeopardy in this case, and defendant's assignment of error is overruled.

[3] In his third assignment of error, defendant contends the trial court erred in failing to suppress evidence obtained from his residence pursuant to a search warrant dated 4 September 1992. Defendant argues that, based upon the totality of the circumstances, the affidavit submitted in support of issuing the search warrant was insufficient to establish probable cause. Therefore, the search of his residence pursuant to the search warrant violated his constitutional rights. Because we find that defendant waived his right to raise on appeal the question of sufficiency of the affidavit and search warrant, we hold that the trial court committed no error.

A defendant who seeks to suppress evidence upon a ground specified in N.C. Gen. Stat. § 15A-974 must comply with the procedural requirements outlined in Article 53, Chapter 15A of the North Carolina General Statutes. *State v. Satterfield*, 300 N.C. 621, 624, 268 S.E.2d 510, 513 (1980); *State v. Holloway*, 311 N.C. 573, 576, 319 S.E.2d 261, 264 (1984), *habeas corpus granted*, *Holloway v. Woodard*, 655 F. Supp. 1245 (1987). Specifically, N.C. Gen. Stat. § 15A-977(a) states that a motion to suppress evidence made before trial "must be accompanied by an affidavit containing facts supporting the motion." See *Holloway*, 311 N.C. at 577, 319 S.E.2d at 264. The burden is upon the defendant to show that he has complied with the procedural requirements of Article 53. *Satterfield*, 300 N.C. at 624-25, 268 S.E.2d at 513-14. In the instant case, defendant failed to file an affidavit to support the motion to suppress. Therefore, he has waived his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant. *Holloway*, 311 N.C. at 577-78, 319 S.E.2d at 264. This assignment of error is overruled.

[4] In his final assignment of error, defendant contends the trial court erred in admitting evidence of a prior conviction as a basis for the habitual felon charge. At trial, defendant objected to the use of a

STATE v. CREASON

[123 N.C. App. 495 (1996)]

previous conviction for uttering a forged bank check claiming that he did not have counsel or that counsel was ineffective, thereby invalidating that conviction. After reviewing the file from that case, the trial judge found that defendant was represented by an attorney; therefore, his constitutional rights relating to representation were not violated and defendant's objection to the use of the conviction was denied. From that denial, defendant appeals.

When appealing the use of a prior conviction as a partial basis for a habitual felon indictment, inquiries are permissible only to determine whether the State gave defendant proper notice that he was being prosecuted for some substantive felony as a recidivist, pursuant to the procedure provided in N.C. Gen. Stat. § 14-7.3 (1993). *See State v. Winstead*, 78 N.C. App. 180, 336 S.E.2d 721 (1985). Questioning the validity of the original conviction is an impermissible collateral attack. The proper procedure which provides defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is under Article 89, Chapter 15A of the North Carolina General Statutes.

While this is a question of first impression, we are guided by the holdings in *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971) and *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846, *motion to dismiss allowed, disc. review denied*, 336 N.C. 614, 447 S.E.2d 410 (1994). In *Stafford*, the defendant was charged with habitual impaired driving, which was based upon three prior impaired driving convictions. The defendant attempted to collaterally attack one of the previous convictions on the ground that it was invalid because the record in that case did not show that the defendant pled guilty "voluntarily and understandingly" as required under *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969). *Stafford*, 114 N.C. App. at 103, 440 S.E.2d at 847. This Court held that the defendant could not collaterally attack the validity of a prior DWI conviction. *Id.* at 104, 440 S.E.2d at 847.

Similarly, in *Noles*, the defendant attempted to collaterally attack the original judgment, which suspended his sentence in an appeal from the revocation of that suspension, again based upon *Boykin*. This Court held that defendant could not collaterally attack the original judgment in the second proceeding. The Court stated that the proper procedure for adjudication of claimed deprivations of constitutional rights after trial was under the Post-Conviction Hearing Act. *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410. In the instant case,

MIDWAY GRADING CO. v. N.C. DEPT. OF E.H.N.R.

[123 N.C. App. 501 (1996)]

defendant is provided adequate opportunity for adjudication of claimed deprivations of constitutional rights under Article 89, Chapter 15A of the North Carolina General Statutes. This assignment of error is overruled.

In summary, we hold being a habitual felon is a status, that once attained, is never lost. In this case, the three underlying convictions used to establish defendant's habitual felon status in another substantive conviction could be used in this case to establish defendant's status as a habitual felon. Secondly, we hold that, in accordance with *State v. Ballenger* 123 N.C. App. at 184, 472 S.E.2d at 575, conviction following assessment under the North Carolina Controlled Substance Tax Act does not constitute Double Jeopardy. Thirdly, we hold defendant waived his right to seek suppression of evidence seized pursuant to a search warrant by failing to include an affidavit containing facts to support his motion to suppress in accordance with N.C. Gen. Stat. § 15A-977. Finally, we hold defendant may not collaterally attack a prior conviction which is the basis of a habitual felon charge. Accordingly, we find that defendant's trial was free from error.

No error.

Chief Judge ARNOLD and Judge MARTIN, John C. concur.

MIDWAY GRADING COMPANY, INC. v. NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF LAND
RESOURCES

No. COA95-443

(Filed 6 August 1996)

**1. Environmental Protection, Regulation, and Conservation
§ 124 (NCI4th)— violation of Sedimentation Pollution
Control Act—requirements for service**

The trial court erred in concluding that respondent agency's service of notice of violation of the Sedimentation Pollution Control Act (SPCA) did not comply with N.C.G.S. § 1-75.10 and with the Rules of Civil Procedure, since the N.C. Administrative Code provided the procedure for sending a notice of violation of

MIDWAY GRADING CO. v. N.C. DEPT. OF E.H.N.R.

[123 N.C. App. 501 (1996)]

the SPCA, and respondent adequately followed that procedure where an officer of petitioner corporation signed the certified mail return receipt for the notice of violation which respondent mailed to petitioner, the officer also being an agent of petitioner for purposes of receiving notice of petitioner's alleged violation of the SPCA. Further, the notice of violation described petitioner's alleged violations "with reasonable particularity" as required by the N.C. Administrative Code.

Am Jur 2d, Pollution Control §§ 46-49, 492-588.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violations of environmental pollution statute. 81 ALR3d 1258.

2. Environmental Protection, Regulation, and Conservation § 124 (NCI4th)—soil erosion and control plan—when filing required

The trial court erred in concluding that petitioner was not required to file a soil erosion and sedimentation plan because petitioner did not own more than one acre of land on which land disturbing activity was being conducted, since N.C.G.S. § 113A-57(4) requires that a party must file a plan if its actions will cause more than one acre of land to be uncovered and does not require that the party causing the disturbance has to own more than one acre of land being uncovered.

Am Jur 2d, Pollution Control §§ 46-49, 492-588.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violations of environmental pollution statute. 81 ALR3d 1258.

Appeal by respondent from order entered 12 December 1994 by Judge Loto G. Caviness in Caldwell County Superior Court. Heard in the Court of Appeals 30 January 1996.

In 1989, citizens of Lake Hickory complained to the North Carolina Department of Environment, Health and Natural Resources, Division of Land Resources (hereinafter respondent) about excess sedimentation draining into Lake Hickory, the water supply for Hickory, North Carolina, from Midway Grading Company, Inc.'s activities near U.S. Highway 321. In response to these complaints, respondent inspected the site on 11 May 1989 and estimated that 1.3 acres of land had been disturbed. On 16 May 1989, respondent sent a

MIDWAY GRADING CO. v. N.C. DEPT. OF E.H.N.R.

[123 N.C. App. 501 (1996)]

Notice of Violation (hereinafter NOV) to Midway Grading Company, Inc. (hereinafter petitioner), certified mail, return receipt requested, stating that petitioner had committed five violations of the North Carolina Sedimentation Pollution Control Act of 1973 (hereinafter SPCA). The NOV was received by petitioner on 17 May 1989 and was signed for by Rena Kiziah, an officer of petitioner and the mother of Greg Kiziah, petitioner's president. The violations included: (1) "[f]ailure to file an erosion and sedimentation control plan with [respondent] at least 30 days prior to beginning a land-disturbing activity;" (2) "[f]ailure to take all reasonable measures to protect all public and private property from damage by such land-disturbing activities;" and (3) "[f]ailure to retain along a lake or natural watercourse a buffer zone of sufficient width to confine visible siltation by natural or artificial means." The NOV stated that if petitioner did not respond to the notice or if the violations were not corrected before 31 May 1989, respondent could assess a civil penalty against petitioner.

Respondent conducted further inspections during the next few months and sent petitioner a Notice of Continuing Violations on 23 June 1989 and a Notice of Additional Violations on 25 October 1989. Petitioner submitted a soil erosion and sedimentation control plan to respondent in July 1989 which respondent disapproved on 11 August 1989. Respondent received petitioner's revised plan on 13 November 1989 and respondent's inspector found petitioner's site to be in compliance with the SPCA on 14 November 1989. Thereafter, respondent assessed a civil penalty against petitioner in the amount of \$8900 for violations of the SPCA petitioner committed from 17 May 1989 through 31 October 1989.

Petitioner petitioned for a contested case hearing in the Office of Administrative Hearings on 30 July 1990. After a hearing, Administrative Law Judge Fred G. Morrison, Jr. entered his recommended decision on 23 December 1992, recommending that the civil penalty be reduced from \$8900 to \$7220. On 12 August 1993, Richard B. Whisnant, General Counsel for respondent, entered the final agency decision, adopting the recommended decision "in full, without change." Petitioner filed a petition for judicial review in the Superior Court of Caldwell County. The superior court order of 12 December 1994 concluded that respondent's service of process did not comply with the North Carolina Rules of Civil Procedure and G.S. 1-75.10 and that petitioner was not required to file a soil erosion and sedimentation plan prior to commencing activity on its site. The superior court remanded the case to the Office of Administrative Hearings.

MIDWAY GRADING CO. v. N.C. DEPT. OF E.H.N.R.

[123 N.C. App. 501 (1996)]

Respondent appeals.

Robbins & Hamby, P.A., by Dale L. Hamby and Donald T. Robbins, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Jay L. Osborne, for respondent-appellant.

EAGLES, Judge.

I.

[1] Respondent first argues that the superior court erred by concluding that respondent's service of process did not comply with G.S. 1-75.10 and with the North Carolina Rules of Civil Procedure. G.S. 1-75.10 provides:

Where the defendant appears in [an] action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

....

(4) Service by Registered or Certified Mail.—In the case of service by registered or certified mail, by affidavit of the serving party averring:

- a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
- b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
- c. That the genuine receipt or other evidence of delivery is attached.

The superior court concluded that respondent did not satisfy the requirements of G.S. 1-75.10 because "the record d[id] not contain an original delivery receipt for any of the notices which Respondent attempted to serve on Petitioner . . . [and] the record d[id] not contain an Affidavit in proof of service by mail for any of the notices which Respondent attempted to serve on Petitioner." Although the superior court did not specify which provision of the Rules of Civil Procedure respondent violated, petitioner argues on appeal that respondent vio-

MIDWAY GRADING CO. v. N.C. DEPT. OF E.H.N.R.

[123 N.C. App. 501 (1996)]

lated Rule 4(b). G.S. 1A-1, Rule 4(b) specifies the appropriate contents of a summons and provides in part that a summons "shall be directed to the defendant or defendants." Petitioner argues that respondent violated Rule 4(b) because the NOV was "not served on the addressee."

The Rules of Civil Procedure apply in administrative proceedings "unless another specific statute or rule . . . provides otherwise." N.C. Admin. Code tit. 26, r. 3.0101(1) (Nov. 1994). Here, respondent never sent a copy of a summons and complaint to petitioner because this was an administrative action regarding alleged violations of the SPCA. Because Rule 4(b) of the Rules of Civil Procedure deals with the contents of a summons, we conclude that it was inapplicable to respondent's service of the NOV.

G.S. 1-75.10 sets out requirements a party must fulfill in order to show that the court has personal jurisdiction over the opposing party when the opposing party contests jurisdiction and argues that service of process was not carried out properly. The North Carolina Administrative Code provides the procedure a party must follow when sending a NOV to an alleged violator of the SPCA. At the time of petitioner's alleged violations, N.C. Admin. Code tit. 15A, r. 4C.0007(a) provided that:

Prior to the assessment of any civil penalty, notice of the violation shall be given the alleged violator(s) or his (their) agent(s) by registered or certified mail, describing the violation with reasonable particularity, specifying a time period for compliance and stating that upon failure to comply the person responsible for the violation shall become subject to the assessment of a civil penalty.

Because the North Carolina Administrative Code provides the procedure a party must follow when sending a NOV, the validity of respondent's service of the NOV must be determined according to the specifications of the North Carolina Administrative Code section instead of G.S. 1-75.10(4).

Rena Kiziah, an officer of petitioner, signed the certified mail return receipt for the NOV which respondent mailed to petitioner on 16 May 1989. The governing regulation regarding proper notice to alleged violators of the SPCA provides that notice must be given to "the alleged violator(s) or his (their) agent(s)." An officer is defined as a "[p]erson holding [an] office of trust, command or authority in [a]

MIDWAY GRADING CO. v. N.C. DEPT. OF E.H.N.R.

[123 N.C. App. 501 (1996)]

corporation.” Black’s Law Dictionary 1083 (6th ed. 1990). An agent is defined as “[a] person authorized by another (principal) to act for or in place of him; one intrusted with another’s business.” Black’s Law Dictionary 63 (6th ed. 1990). Based on these definitions, we conclude that Rena Kiziah, an officer of petitioner, was also an agent of petitioner for purposes of receiving notice of petitioner’s alleged violations of the SPCA. After reviewing the NOV which respondent sent to petitioner, we also conclude that the NOV described petitioner’s alleged violations “with reasonable particularity” as required by the applicable provision of the North Carolina Administrative Code set out above. Accordingly, respondent’s method of notifying petitioner of its alleged violations satisfied the requirements of N.C. Admin. Code tit. 15A, r. 4C.0007(a) and the superior court erred in concluding that respondent’s service of process was insufficient.

II.

[2] Respondent also argues that the superior court erred by concluding that petitioner was not required to file a soil erosion and sedimentation plan because petitioner did not own more than one acre of land on which land-disturbing activity was being conducted. G.S. 113A-57(4) provides that “[n]o person shall initiate any land-disturbing activity on a tract if more than one acre is to be uncovered unless, 30 or more days prior to initiating the activity, an erosion and sedimentation control plan for such activity is filed with the agency having jurisdiction.” The plain language of G.S. 113A-57(4) requires that a party must file an erosion and sedimentation control plan if its actions will cause more than one acre of land to be uncovered. The statute does not require that the party causing the disturbance has to own more than one acre of the land being uncovered. Accordingly, we conclude that the superior court erred in its interpretation of G.S. 113A-57(4).

This case is remanded to the superior court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges MARTIN, JOHN C., and MARTIN, MARK D., concur.

WEAVER v. AMERICAN NATIONAL CAN CORP.

[123 N.C. App. 507 (1996)]

JAMES RALPH WEAVER, PLAINTIFF-EMPLOYEE v. AMERICAN NATIONAL CAN
CORPORATION, DEFENDANT-EMPLOYER

No. COA95-745

(Filed 6 August 1996)

Workers' Compensation § 399 (NCI4th)— testimony disregarded by Commission—error

The Industrial Commission's findings of fact showed that the Commission impermissibly disregarded the testimony of plaintiff's coworkers which corroborated plaintiff's testimony that he had suffered an injury to his back, and the case is therefore vacated and remanded to the Commission for it to consider all of the evidence, make complete findings of fact and proper conclusions of law, and enter an appropriate order.

Am Jur 2d, Workers' Compensation §§ 602 et seq.

Appeal by plaintiff from opinion and award entered 13 March 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 March 1996.

This case arises from the denial of Workers' Compensation benefits by the Industrial Commission after a hearing before Deputy Commissioner Scott M. Taylor and a review by the full commission.

James Weaver (hereinafter plaintiff) began working at American National Can Corporation (hereinafter defendant) in 1978. In approximately 1982, plaintiff began working as a furnace operator for defendant. Plaintiff's responsibilities included operating the machinery that mixes the raw materials and melts them into glass. At times, the raw material would harden in the storage bins before it could flow into the furnace and plaintiff would have to unplug the obstruction by climbing up a ladder and beating the obstruction loose with a sledge hammer.

In 1988, plaintiff injured his back at work and underwent surgery by Dr. John Leonard to excise a ruptured disc at the L4-L5 region. After the surgery, plaintiff returned to work for defendant. In March or early April 1992, plaintiff was coming home from a church meeting when he felt pain behind his left knee. Plaintiff sought the help of a chiropractor, Dr. Mark Hooper, beginning on 6 April 1992. Plaintiff continued to experience difficulty with his leg, but plaintiff testified that the pain did not affect his ability to perform his job.

WEAVER v. AMERICAN NATIONAL CAN CORP.

[123 N.C. App. 507 (1996)]

On 9 April 1992 while plaintiff was working second shift, plaintiff tried to unplug an obstruction in a storage bin with another employee, Mike Jernigan. Plaintiff testified that as he hit the storage bin with the sledge hammer, "something felt like it busted in my back and run all over. I felt excruciating pain going down—my lower back and down the left leg." Plaintiff testified that "I almost fell and caught myself and just eased down" the ladder. Mr. Jernigan testified that plaintiff looked like "he was in real—a whole lot of pain" so Mr. Jernigan told plaintiff to take it easy while Mr. Jernigan unplugged the obstruction. Mike Trail, a raw material unloader, testified that plaintiff came into the control room on 9 April 1992 and told Mr. Trail that "he thought he had pulled something in his back." Mr. Trail observed plaintiff rubbing his back.

Plaintiff testified that he did not report his injury on 9 April 1992 because there was no supervisor present during the second shift. Plaintiff also stated that the medical department was not open at the time of the injury. Plaintiff testified that he told his supervisor, Bob Ryder, about the injury on 10 April 1992 and that Mr. Ryder said he hoped the injury was not serious. Mr. Ryder testified that he knew plaintiff was having back problems in March and April of 1992 but that plaintiff never told him that he had injured his back at work and that Mr. Ryder first learned of the alleged incident after plaintiff filed an Industrial Commission Form 18 on 20 August 1992.

Plaintiff continued to work second shift although the pain continued to increase in his leg and lower back. On 14 April 1992, Dr. Hooper gave plaintiff a note excusing him from work. Plaintiff testified that he gave the note to George Clayton, the personnel manager for defendant, at an awards luncheon for perfect attendance. Plaintiff testified that Mr. Clayton talked to the plant manager and that they decided that they wanted plaintiff to see Dr. Leonard. Plaintiff saw Dr. Leonard on 16 April 1992 and Dr. Leonard diagnosed plaintiff as "most likely" having suffered a new injury to the L5-S1 region. Dr. Leonard gave plaintiff a note taking him out of work until Dr. Leonard released him. Plaintiff underwent surgery on 27 April 1992 and then received physical therapy for fourteen weeks. In his deposition, Dr. Leonard testified:

It's my opinion—based on this history of a worsening of his pain down his leg and the fact that swinging a sledgehammer imparts a flexion strain on the back which can worsen a pre-existing ruptured disk, my opinion is that this may have had

WEAVER v. AMERICAN NATIONAL CAN CORP.

[123 N.C. App. 507 (1996)]

some degree of disk herniation present before he swung the hammer and that when he swung the hammer he caused the cover of the disk to tear completely and extruded the disk. . . . So while I don't feel that the sledgehammer swinging caused the ruptured disk—it may have been there in some form before that—I think that it caused the ruptured disk to extrude or go to its final stage, and that absolutely canceled any idea of recovery without surgery.

Dr. Leonard assigned an eighteen percent permanent partial disability rating to plaintiff's injury.

Dr. Leonard released plaintiff to return to work on 12 October 1992, but defendant first wanted plaintiff to see the company doctor. After receiving the doctor's report, defendant would not allow plaintiff to return to work. Plaintiff testified that George Clayton told plaintiff that he should "sign up for SSI disability and for unemployment." On 1 February 1993, plaintiff finally was allowed to return to work as a line attendant. Plaintiff remained in that position for approximately four weeks and then returned to his former job as a furnace operator.

Plaintiff filed a claim with the North Carolina Industrial Commission for Workers' Compensation on 24 August 1992. After conducting a hearing on 18 May 1993, the deputy commissioner denied plaintiff's claim, finding that plaintiff's testimony was not credible and concluding that plaintiff had not suffered an injury arising out of or in the course of his employment. Plaintiff appealed to the full commission, which affirmed the deputy commissioner's recommended decision. Commissioner James J. Booker dissented and plaintiff appeals.

Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr. and Martha A. Geer, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Henry W. Gorham and Karen K. Prather, for defendant-appellee.

EAGLES, Judge.

Plaintiff argues that the record does not support the Industrial Commission's findings of fact and that the Industrial Commission's conclusions of law are not supported by its findings of fact. In Workers' Compensation cases, the Industrial Commission's findings of fact are conclusive on appeal if there is any competent evidence to

WEAVER v. AMERICAN NATIONAL CAN CORP.

[123 N.C. App. 507 (1996)]

support them, even if there is conflicting evidence. *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). The Industrial Commission's conclusions of law are fully reviewable on appeal. *Id.* Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it. *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

Here, the Industrial Commission, without receiving further evidence, reviewed the opinion and award of the deputy commissioner based on the record before the Commission and made findings of fact detailing plaintiff's version of the events of 9 April 1992 plus the following two findings of fact:

6. The Full Commission, however, does not accept plaintiff's testimony as credible, based on plaintiff's testimony and demeanor, and the testimony of other witnesses.
7. Since plaintiff's testimony is not credible, plaintiff did not prove that any injury which he may have sustained on or about 9 April 1992 resulted from a specific traumatic incident of the work assigned, or from an interruption of his normal work routine by the introduction of unusual conditions likely to result in unexpected consequences.

The Industrial Commission's finding of fact number seven provides that because the Industrial Commission did not find plaintiff's testimony credible, plaintiff had not proven his case. The Industrial Commission "is the sole judge of the credibility of the witness and the weight to be given its testimony," *Dye v. Shippers Freight Lines*, 118 N.C. App. 280, 284, 454 S.E.2d 845, 848 (1995), and the Industrial Commission may find that a witness is not credible based on the witness's demeanor during the hearing. *Dye*, 118 N.C. App. at 283, 454 S.E.2d at 848. However, here, the Industrial Commission made no mention of plaintiff's coworkers' testimony which corroborated plaintiff's testimony. Mr. Jernigan testified that plaintiff appeared to be in a lot of pain after he swung at the obstruction in the storage bin: "He's usually like a bull, just real energetic and moving around. But he was—he was in pain." Mr. Jernigan also testified that plaintiff told him that plaintiff "felt like something busted loose in [his] back." Mr. Trail testified that plaintiff told him on 9 April 1992 that he thought he

CHARLOTTE HOUSING AUTHORITY v. FLEMING

[123 N.C. App. 511 (1996)]

had pulled something in his back and Mr. Trail observed plaintiff rubbing his back.

We conclude that the Industrial Commission's finding of fact number seven shows that the Industrial Commission impermissibly disregarded Mr. Jernigan's and Mr. Trail's testimony. Accordingly, this case must be vacated and remanded to the Industrial Commission for it to consider *all* of the evidence, make complete findings of fact and proper conclusions of law, and enter an appropriate order.

Vacated and remanded.

Judges JOHN and WALKER concur.

CHARLOTTE HOUSING AUTHORITY, PLAINTIFF-APPELLEE v. MARTHA FLEMING,
DEFENDANT-APPELLANT

No. COA95-712

(Filed 6 August 1996)

**Housing, and Housing Authorities and Projects § 23
(NCI4th)— resident of public housing—alleged criminal
activity of son—son not guest—eviction improper**

The trial court erred in finding that defendant, a resident of public housing, had a guest (her son) who engaged in criminal activity and in ordering her to vacate the premises where the evidence tended to show that on the occasion in question defendant was not aware of the presence of her son in front of her apartment until after he arrived, had not invited him to her apartment in advance, did not extend him any hospitality after becoming aware of his arrival, and did not invite him to participate in any activity; the son was thus not a guest of defendant; and evidence of defendant's activities prior to the date in question was irrelevant.

**Am Jur 2d, Housing Laws and Urban Redevelopment
§ 33.**

Due process rights of applicants for low income housing assistance benefits under § 8 of Housing Act of 1937, as amended (41 USCS § 1437f). 66 ALR Fed. 721.

CHARLOTTE HOUSING AUTHORITY v. FLEMING

[123 N.C. App. 511 (1996)]

Appeal by defendant from order entered 23 February 1995 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 4 June 1996.

Robinson, Bradshaw & Hinson, P.A., by A. Todd Capitano, for plaintiff-appellee.

Legal Services of Southern Piedmont, Inc., by Theodore O. Fillette, III, and Deborah A. Nance, for defendant-appellant.

WYNN, Judge.

Since early 1983, defendant Martha Fleming has rented an apartment in the Savannah Woods complex from the Charlotte Housing Authority ("CHA"). This matter arises from an action started in October 1994 by CHA to evict Ms. Fleming because of the alleged criminal activities of her adult son, Arthur, who did not live with her.

During the evening of 3 October 1994, Officers J.L. Jennings and J.K. Patina observed Arthur and a group of other men standing in the Savannah Woods complex near Ms. Fleming's apartment. Two of the men noticed the police car and attempted to flee. Officer Jennings chased the two men on foot into a wooded area off of the premises of the apartment complex where he saw one of the men throw something into the bushes. A short time thereafter, Officer Jennings apprehended Arthur and charged him with resisting a public official and possession of cocaine with intent to distribute. The record does not indicate that Arthur was ever convicted on any charges stemming from this arrest.

Ms. Fleming testified that during the evening of 3 October, she observed a car light through her window, looked out of that window, and saw Arthur exiting a car. Later, her nephew came into her apartment and informed her that the police were chasing someone. Ms. Fleming then left her apartment and observed her son, already under arrest, being placed in a police car.

Based on the alleged criminal activity of Arthur Fleming, CHA filed a summary ejectment action against Ms. Fleming in Mecklenburg County Small Claims Court, relying on two provisions of her lease which allowed for her eviction if her guests or visitors engaged in criminal activity. The small claims court dismissed the action, finding that CHA had not proved by a preponderance of the evidence that it had grounds to evict Ms. Fleming. CHA appealed for a trial *de novo* to the Mecklenburg County District Court. In an order

CHARLOTTE HOUSING AUTHORITY v. FLEMING

[123 N.C. App. 511 (1996)]

dated 23 February 1995, Judge William Constangy found for the CHA, and ordered Ms. Fleming to vacate the premises. From this order, Ms. Fleming appeals.

The issue on appeal is whether CHA failed to present sufficient evidence to show that: (I) Arthur was a guest in Ms. Fleming's apartment at the time of his alleged criminal activity, or (II) Arthur was engaged in criminal activity. We reverse on the basis that Arthur was not a guest of Ms. Fleming and therefore do not reach the alternative issue of whether the evidence showed he was engaged in criminal activity.

In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable. *See, Morris v. Austraw*, 269 N.C. 218, 223, 152 S.E.2d 155, 159 (1967) (quoting 32 Am. Jur., *Landlord and Tenant*, § 848). In addition, "Our courts do not look with favor on lease forfeitures." *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988).

In the instant case, CHA relied on two provisions of Ms. Fleming's lease which allowed CHA to evict her if her guests engaged in criminal activity. Paragraph 16(f) of the lease states:

I, all members of my household, our *guests* or visitors and other persons under control of household members, shall not engage in criminal activity, . . . on or near CHA property, while I am a resident in public housing, and such criminal activity shall be cause for termination of the lease

(emphasis supplied). Paragraph 20(b) states:

[I]f I, members of my household, our *guests* or visitors, and other persons under our control, engage in criminal activity, including drug-related activities, on or near CHA property, the CHA may end my lease.

(emphasis supplied).

Since CHA sought to evict Ms. Fleming due to the alleged criminal activity of a guest, CHA must show that Arthur was a guest of Ms. Fleming's on 3 October 1994. This it failed to do.

CHARLOTTE HOUSING AUTHORITY v. FLEMING

[123 N.C. App. 511 (1996)]

The word "guest" is not defined in Ms. Fleming's lease; accordingly, it should be given its natural and ordinary meaning. *See, Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 331 (1990) (holding that the rules governing interpretation of a lease are the same as those governing interpretation of a contract); *E.L. Scott Roofing Co. v. State of N.C.*, 82 N.C. App. 216, 223, 346 S.E.2d 515, 520 (1986) (holding that when a term is not defined in a contract, the presumption is that the term is to be given its ordinary meaning and significance); *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989) (holding that contracts are construed against the drafter). Webster's Third New International Dictionary defines "guest" as follows: "a person entertained in one's house, . . . a person to whom *hospitality is extended*, . . . one invited to participate in some activity at the expense of another . . ." (emphasis supplied).

The uncontroverted evidence in the instant case is that Ms. Fleming was not aware of Arthur's presence in front of her apartment until after he arrived, had not invited him to her apartment in advance, did not extend him any hospitality after becoming aware of his arrival, and did not invite him to participate in any activity. Instead, the evidence shows that Arthur came to Savannah Woods of his own volition, met with Lenon Smith, and possibly others, and did not speak with Ms. Fleming until after he was arrested. In addition, there was uncontroverted evidence that Arthur often visited Savannah Woods without stopping to see Ms. Fleming.

CHA nonetheless contends that the trial court properly labeled Arthur as a guest because there was evidence that: (1) Ms. Fleming had on a past occasion allowed her apartment to be used as a refuge for those suspected of criminal activity; (2) Lenon Smith, the man arrested with Arthur on 3 October 1994, was arrested in front of Ms. Fleming's apartment in the prior week, and retrieved his identification from Ms. Fleming's apartment; (3) Ms. Fleming had previously interfered with the Police Department's efforts to alleviate the drug problem in Savannah Woods; (4) following his arrest, Arthur called Ms. Fleming to ensure that she looked after his car; and (5) Ms. Fleming is Arthur's mother, a close relative.

We find that this evidence is not relevant in determining whether Arthur was a guest of Ms. Fleming's on 3 October 1994. Instead, the relevant question is whether Arthur met the definition of a guest of Ms. Fleming when he visited Savannah Woods on that date. The evi-

LIBERTY FINANCE CO. v. BDO SEIDMAN

[123 N.C. App. 515 (1996)]

dence in this case fails to show that Ms. Fleming either invited Arthur to Savannah Woods on 3 October, or acted in any way to extend him hospitality once he arrived. Accordingly, we conclude that the record does not support the conclusion that Arthur was a guest of Ms. Fleming's on that date.

For the foregoing reasons, the order of the trial court is,

Reversed.

Judges EAGLES and SMITH concur.



LIBERTY FINANCE COMPANY, PLAINTIFF v. BDO SEIDMAN, DEFENDANT

No. COA95-727

(Filed 6 August 1996)

**Accountants § 21 (NCI4th)— negligent misrepresentation by
CPA alleged—financial statements—dismissal improper**

The issue of whether plaintiff justifiably relied on unaudited financial statements prepared by defendant CPA firm should not have been dismissed, since plaintiff's knowledge and the sufficiency of its inquiries into a company's financial status were factual matters not yet of record.

Am Jur 2d, Accountants §§ 24, 25.

**Liability of public accountant to third parties. 46
ALR3d 979.**

Appeal by plaintiff from order entered 20 April 1995 by Judge James E. Ragan, III in Guilford County Superior Court. Heard in the Court of Appeals 1 March 1996.

Hill, Evans, Duncan, Jordan & Davis, P.L.L.C., by Thomas C. Duncan, R. Thompson Wright and Everett B. Saslow, Jr., for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., Jeffrey E. Oleynik and James C. Adams, II, for defendant-appellee.

LIBERTY FINANCE CO. v. BDO SEIDMAN

[123 N.C. App. 515 (1996)]

LEWIS, Judge.

Plaintiff appeals from the trial court's order dismissing his complaint for failure to state a claim upon which relief could be granted. N.C.G.S § 1A-1, Rule 12(b)(6) (1990). Plaintiff alleges that defendant was negligent in preparing the reviewed financial statements which were justifiably relied on by plaintiffs in extending credit to Alden Metals, Inc. and Atlas Steel, Inc. (hereinafter "Alden"). The issue on appeal is whether the plaintiff in its action for negligent misrepresentation could, as a matter of law, justifiably rely upon the alleged misrepresentations made by the defendant.

Plaintiff makes the following allegations in the complaint: Plaintiff Liberty Finance Company (hereinafter "Liberty") is in the business of factoring. Plaintiff entered into Security Agreements for assignments of accounts receivable (hereinafter "Security Agreements") with Alden, whereby Liberty agreed to advance money to Alden upon the assignment of accounts receivable from Alden. Alden warranted and guaranteed to Liberty that every invoice assigned to Liberty under the Security Agreements represent a completed sale to a customer. Furthermore, these Security Agreements provided that Alden would make available certain financial statements and that Liberty had the option of requesting that they be prepared by an independent certified public accountant.

The defendant BDO Seidman (hereinafter "Seidman") is in the business of providing professional services as certified public accountants. The defendant prepared the tax returns and reviewed annual financial statements for Alden. Liberty alleges that in preparing the statements Seidman knew that Liberty or a lender in the same class as Liberty would rely upon the opinions asserted in these financial statements in connection with its extensions of credit to Alden. Liberty also alleges that Seidman knew of the lending arrangement between Alden and Liberty and knew that the financial statements would be used by Alden to represent its financial condition to Liberty. Moreover, it is alleged that the financial statements prepared by the defendant and reviewed by the plaintiff were false and misleading in that they overstated accounts receivable and retained earnings each by four million dollars.

Liberty argues that Seidman was negligent because it: (1) failed to confirm that the financial statements were prepared in accordance with generally accepted accounting principles; (2) failed to ascertain the appropriate type of accounting or financial statement preparation

LIBERTY FINANCE CO. v. BDO SEIDMAN

[123 N.C. App. 515 (1996)]

in Alden's line of business; (3) failed to conduct analytical techniques appropriate to reviewed financial statements, which analytical techniques would have revealed deficiencies in the accounts receivable and income recognition of Alden; (4) failed to investigate further into Alden's accounts receivable or other accounts where such additional inquiries should have been made in the exercise of reasonable professional judgement; and (5) otherwise failed to exercise reasonable care in conducting the review and in the preparation of the financial statements. Alden later defaulted and Liberty was unable to recover the money it was owed.

The only issue before us is whether the trial court erred by dismissing the complaint on the ground that Liberty could not justifiably rely on reviewed financial statements as a matter of law.

In reviewing a Rule 12(b)(6) motion to dismiss, we must take the allegations in the complaint as true. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). Where it appears to a certainty that a plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim, dismissal for failure to state a claim upon which relief can be granted is proper. *Sutton v. Duke* 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970).

Liberty contends that it has sufficiently alleged justifiable reliance and that this reliance on financial statements is a question to be resolved at trial. Seidman responds that Liberty could not, as a matter of law, have justifiably relied on the financial statements it reviewed because the report provided no opinion on the accuracy of the statements and contained a disclaimer detailing the limited scope of the report.

Seidman relies primarily upon *Raritan River Steel Co. v. Cherry, Bekaert, & Holland*, 322 N.C. 200, 214, 367 S.E.2d 609, 617 (1988), which adopts the Restatement (Second) of Torts § 552 (1977) in determining an accountant's liability for negligent misrepresentation. Citing *Raritan*, Seidman claims there must be reliance by plaintiff upon *audited* financial statements. *Id.* at 206-7, 367 S.E.2d at 613 (emphasis added).

In *Raritan*, our Supreme Court held that plaintiffs who have relied on financial information in an accountant's audit report must demonstrate that they obtained the information from the report itself and further held that the scope of an accountant's liability for negligent misrepresentation is best measured by the Restatement

LIBERTY FINANCE CO. v. BDO SEIDMAN

[123 N.C. App. 515 (1996)]

(Second) of Torts § 552 (1977). *Id.* at 207, 214, 367 S.E.2d at 613, 617. This case is distinguishable from *Raritan*. In *Raritan* the Court did not address whether reliance on reviewed financial statements is justifiable; rather it speaks specifically about *audited* financial statements. *Id.* at 207, 367 S.E.2d at 613 (emphasis added). However, there is language in *Raritan* that suggests that a claim for negligent misrepresentation *can* be brought based on unaudited financial information. Interpreting the Restatement approach, the Court stated that an

accountant who audits or *prepares financial information* for a client owes a duty of care not only to the client but to any other person, or one of a group of persons, whom the accountant or his client intends the information to benefit; and that person reasonably relies on the information in a transaction; or one substantially similar to it, that the accountant or his client intends the information to influence.

Id. at 210, 367 S.E.2d at 614 (emphasis added).

In *Ness v. Jones*, 89 N.C. App. 504, 507, 366 S.E.2d 570, 572 (1988), we held that plaintiffs stated a sufficient claim for relief where they alleged that the defendants, real estate agents, erroneously advised plaintiffs that the plaintiff-wife was entitled to Veterans' Administration home financing separate and apart from her husband's V.A. entitlement. Plaintiffs alleged that they justifiably relied upon this information and sold their home to a couple who assumed plaintiffs' V.A. loan, thereby using up plaintiff-husband's V.A. entitlement. *Id.* at 505, 366 S.E.2d at 571. After plaintiffs entered into a contract to buy another home and applied for V.A. financing using plaintiff-wife's V.A. entitlement, they were informed by the lending institution that they were not eligible for V.A. financing. *Id.* Defendants contended that the trial court properly held that the plaintiffs' reliance was unreasonable as a matter of law. *Id.* at 506, 366 S.E.2d at 571-72. We reversed the trial court's dismissal and held that the plaintiff's knowledge and inquiries into their loan eligibility were factual matters not yet of record. *Id.* at 507, 366 S.E.2d at 572.

Here, as in *Ness*, plaintiff's knowledge and the sufficiency of its inquiries into Alden's financial status are factual matters not yet of record. We conclude that the issue of whether plaintiff justifiably relied on the financial statements prepared by defendant should not be dismissed, as a matter of law, at this stage of the proceedings.

CAROLINA CABLE & CONNECTOR v. R&E ELECTRONICS, INC.

[123 N.C. App. 519 (1996)]

We hold that plaintiff has stated a sufficient claim for relief and that the trial court erred in dismissing it.

Reversed and remanded.

Judges GREENE and SMITH concur.

CAROLINA CABLE & CONNECTOR, PLAINTIFF, v. R&E ELECTRONICS, INC., A NORTH CAROLINA CORPORATION, AND TELECOMMUNICATIONS AND ENVIRONMENTAL SUPPORT CORPORATION, DEFENDANTS

No. COA95-607

(Filed 6 August 1996)

Accounts and Accounts Stated § 14 (NCI4th)— promise to pay debt of plaintiff's customer—insufficiency of evidence

There was no competent evidence that defendant promised to pay the account debt of a customer to plaintiff supplier where defendant sent a letter to plaintiff stating that defendant had entered into an agreement to provide financing and various advisory functions to the customer, stating that defendant "plans to supply funding for [the customer] to bring your account current as quickly as possible," and asking for verification of the account balance in order to establish a payment plan, but the letter did not explicitly promise to pay the account debt, and plaintiff never received any other communication from defendant.

Am Jur 2d, Accounts and Accounting § 8.

Judge WALKER dissenting.

Appeal by defendant TESCOR from judgment entered 20 December 1994 by Judge Susan Renfer in Wake County District Court. Heard in the Court of Appeals 27 February 1996.

Carolina Cable & Connector, Inc. (hereinafter plaintiff) is a company engaged in the business of selling communications products. From August 1992 through December 1992, plaintiff sold communications equipment for sales prices totalling \$16,554.17 to R&E Electronics, Inc. (hereinafter R&E). During this time, plaintiff provided monthly billing statements to R&E, but R&E failed to make any

CAROLINA CABLE & CONNECTOR v. R&E ELECTRONICS, INC.

[123 N.C. App. 519 (1996)]

payments except for one payment of \$66.50. Plaintiff alleges that as it was preparing to file a lawsuit against R&E in January 1993, plaintiff received a letter from TESCOR (Telecommunications and Environmental Support Corporation) (hereinafter defendant), a company in the business of assisting financially troubled companies in obtaining financing. In defendant TESCOR's letter to plaintiff dated 21 January 1993, defendant stated that it had "entered into an agreement with [R&E] to provide financing and various advisory functions." Defendant requested plaintiff to fill out an Account Verification Form. Defendant stated that it would be in contact with plaintiff upon completion of its initial analysis. Plaintiff never received any other communication from defendant TESCOR.

On 15 July 1993, after plaintiff still had received no further payment on R&E's account, plaintiff filed suit against R&E and defendant to recover \$16,554.17 plus eighteen percent interest per annum. In the complaint, plaintiff claimed that defendant had "assumed responsibility for R&E's account" and had "promised to pay" R&E's account. On 15 July 1994, plaintiff moved for summary judgment and the trial court granted plaintiff's motion as to R&E, determining that plaintiff should recover from R&E \$16,554.17 plus eighteen percent interest per annum until plaintiff was paid in full. The trial court denied plaintiff's motion as to defendant. R&E subsequently filed for bankruptcy.

On 15 December 1994, plaintiff's case went to trial against defendant. After the presentation of the evidence, the trial court found that in defendant's 21 January 1993 letter, defendant had promised to pay off R&E's accounts payable, including plaintiff's account. The trial court determined that plaintiff was entitled to recover \$16,554.17 plus eighteen percent interest per annum from defendant.

Defendant appeals.

Burns, Day & Presnell, P.A., by Susan F. Vick, for plaintiff-appellee.

Farris & Farris, P.A., by Thomas J. Farris, for defendant-appellant.

EAGLES, Judge.

Defendant argues that there is no competent evidence to support the trial court's findings of fact numbers four and eight in which the trial court found that defendant had promised to pay off R&E's debt to plaintiff. In a bench trial, the trial court's findings of fact are con-

CAROLINA CABLE & CONNECTOR v. R&E ELECTRONICS, INC.

[123 N.C. App. 519 (1996)]

clusive on appeal if there is competent evidence to support the findings, even if there is evidence which could support findings to the contrary. *Blackwell v. Butts*, 278 N.C. 615, 619, 180 S.E.2d 835, 837 (1971). Here, defendant's letter to plaintiff provided:

As you have been made aware, TESCOR has entered into an agreement with your customer, *R&E Electronics*, to provide financing and various advisory functions. Through this arrangement, TESCOR's goal is to see *R&E Electronics* expand its growth without realizing the cash-flow problems that naturally come with the expansion of any company.

An essential ingredient to the success of *R&E Electronics* through this transition is to continue its relationship with its solid vendor base. *R&E* has greatly benefited from its relationship with you as a supplier and we want that to continue. Our expectations in the short term are to bring our account to current status and to maintain those terms. Our long-term goals are to grow by using you as one of our key suppliers and to soon be in a position to pay invoices early and take advantage of discounts.

TESCOR saw *R&E* as a firm that has the capabilities to become one of the nation's largest providers of various telecommunications and electronics services. TESCOR will be the support vehicle to make that vision a reality.

We appreciate your past support. TESCOR plans to supply funding for *R&E* to bring your account current as quickly as possible. In order to establish our payoff plan for your account, we must verify all account balances. Please complete the attached *Account Verification Form* and return it to the address shown at the bottom of the form.

Upon completion of our initial analysis, we will be in contact with you concerning our plans to bring your account to current status. We look forward to a continuing relationship. Your patience and understanding is greatly appreciated. You can look for great things to happen in the future with *R&E Electronics*.

In *Bowman v. Hill*, 45 N.C. App. 116, 262 S.E.2d 376 (1980), we stated that "[o]ne of the elements of a valid contract is a promise, which has been defined as an assurance that a thing will or will not be done. '[However,] the mere expression of an intention or desire is not a promise.'" *Hill*, 45 N.C. App. at 117, 262 S.E.2d at 377 (quoting 17A Am. Jur. 2d, Contracts § 3 (1991)). Here, in defendant's letter to

CAROLINA CABLE & CONNECTOR v. R&E ELECTRONICS, INC.

[123 N.C. App. 519 (1996)]

plaintiff, defendant merely indicated to plaintiff that it planned to provide funding for R&E. Defendant did not promise to pay R&E's debt. Defendant's letter did "not carry the thrust of a promise to do or refrain from doing anything." *Hill*, 45 N.C. App. at 118, 262 S.E.2d at 377. At trial, plaintiff's only witness, its credit manager, testified that plaintiff never received any other communication, written or oral, from defendant. After carefully reviewing the record, we conclude that there is no competent evidence to support the trial court's findings that defendant promised to pay R&E's debt.

Reversed.

Judge JOHN concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I disagree with the majority that there is no competent evidence to support the trial court's findings of fact. Here, the court made the following relevant findings:

Findings of Fact

4. On or about January 21, 1993, defendant Telecommunications and Environmental Support Corporation (hereinafter referred to as "TESCOR") informed plaintiff by way of a letter that: a financial relationship existed between TESCOR and defendant R&E; TESCOR was providing financing to defendant R&E; TESCOR promised to pay off R&E's accounts, including plaintiff's account; and TESCOR intended to continue to use R&E's vendors, including plaintiff and wanted to maintain a relationship with plaintiff. This letter was signed by the Vice President of TESCOR, Greg Hales, and was not a draft or preliminary copy of any letter earlier written by TESCOR.

...

7. As a result of the letter received by plaintiff, TESCOR's promise to pay the account and TESCOR's statement that it would continue to use plaintiff as a vendor, plaintiff refrained from initiating suit against R&E in January of 1993.

8. As a result of TESCOR's conduct and the letter and account verification form received by plaintiff, TESCOR assumed respon-

OWENS v. CHANCE

[123 N.C. App. 523 (1996)]

sibility for R&E's account and is therefore liable for the debt owed by R&E to plaintiff.

...

10. Plaintiff is entitled to recover from defendant TESCOR the sum of \$16,554.17 plus interest at the rate of eighteen percent per annum from July 1, 1993 until plaintiff is paid in full.

Conclusions of Law

1. Defendant Telecommunications and Environmental Support Corporation is liable to plaintiff in the amount of \$16,554.17 as TESCOR assumed liability of R&E to plaintiff.

The evidence shows that plaintiff was preparing to file suit against R&E at the time plaintiff received the letter from TESCOR dated 21 January 1993. The letter was replete with specific references to TESCOR's intentions and promises to pay the balance due on the account. Additionally, the letter included an Account Verification Form which noted the balance due plaintiff and requested that the balance be verified and returned directly to TESCOR. Based on the promises contained in the letter and the Account Verification Form, plaintiff agreed to refrain from filing suit against R&E in January of 1993 and waited for payment from TESCOR. After careful review of the evidence in the record, I conclude that the challenged findings and conclusions are supported by competent evidence. Therefore, I would affirm the trial court's judgment.

Q. MELISSA OWENS, PLAINTIFF V. JOSEPH THOMAS CHANCE AND ALLSTATE
INSURANCE COMPANY, DEFENDANTS

No. COA95-346

(Filed 6 August 1996)

**Insurance § 425 (NCI4th)— wife's insurance policy—husband's
vehicle not listed in policy—no coverage**

An automobile insurance policy issued to defendant's wife did not provide liability coverage for defendant husband while he was driving a truck owned by him but not listed in the declarations portion of the policy.

Am Jur 2d, Automobile Insurance §§ 172, 225 et seq.

OWENS v. CHANCE

[123 N.C. App. 523 (1996)]

Appeal by plaintiff from order entered 26 January 1995 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 26 March 1996.

Hardee & Hardee, by G. Wayne Hardee and Charles R. Hardee, for plaintiff-appellant.

Ward & Smith, P.A., by Joseph A. Hayes, III and John M. Martin, for defendant-appellee.

LEWIS, Judge.

The issue presented for our review is whether an Allstate policy issued to Margaret Barnhill Chance (hereinafter "Margaret Chance") provided liability coverage for her husband, while he was driving a truck owned by him but not listed in the Declarations portion of the policy.

Plaintiff Q. Melissa Owens and defendant Joseph Thomas Chance (hereinafter "Joseph Chance") were involved in an automobile accident from which plaintiff suffered bodily injury. The defendant's vehicle, a 1990 Chevrolet truck, was insured by State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") with a liability limit of \$50,000 per person. Defendant's wife, Margaret Chance, was insured by an Allstate Insurance Company automobile insurance policy with a bodily injury liability limit of \$100,000 per person. The Allstate policy listed as covered a 1990 Chrysler and a 1987 Honda.

The 1990 Chevrolet truck involved in the accident was not listed as a covered vehicle on the Allstate policy. The policy states that "[your] covered auto" means any vehicle shown in the Declarations." We conclude that the 1990 Chevrolet is not a "covered auto" under the Allstate policy.

Plaintiff contends that Joseph Chance is a covered person and that the policy does not otherwise exclude coverage for his ownership, maintenance or use of the 1990 Chevrolet truck. The Allstate policy language at issue provides as follows:

B. We do *not* provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than *your covered auto*, which is:
 - a. owned by you; or
 - b. furnished for your regular use.

OWENS v. CHANCE

[123 N.C. App. 523 (1996)]

2. Any vehicle, other than *your covered auto*, which is:

- a. owned by *any family member*; or
- b. furnished for the regular use of any *family member*.

However, this exclusion (B.2) does not apply to your maintenance or use of any vehicle which is:

- a. owned by a *family member*; or
- b. furnished for the regular use of a *family member*.

(Emphasis added).

The definitions section of the Allstate policy states that throughout the policy, “you” and “your” refer to: 1) the “named insured” shown in the Declarations and 2) the spouse if a resident of the same household. The policy defines “family member” as “a person related to you by blood, marriage or adoption who is a resident of your household, this includes a ward or foster child.” Plaintiff urges us to construe these policy exclusions and exception so that Joseph Chance is both a “family member” and “you” and “your” on any given reading of these provisions.

While we agree that Joseph Chance can qualify as a “family member” when his wife’s name is substituted for “you” and “your”, he cannot also be a “family member” when his name is substituted for “you” and “your.” The terms “you”, “your” and “family member” must be applied consistently and exclusive of each other on any given reading of these provisions. The term “family member” refers to a third party, as it relates to “you” or “your”.

When the definitions in the Allstate policy are applied to the facts of this case, the exclusions and exception at issue can be read in one of two ways. If Margaret Chance is substituted for “you” and “your” and Joseph Chance is substituted for “family member”, these provisions read as follows:

B. We do *not* provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than *your* (Margaret Chance) *covered auto*, which is:

- a. owned by you (Margaret Chance) or
- b. furnished for your (Margaret Chance) regular use.

OWENS v. CHANCE

[123 N.C. App. 523 (1996)]

2. Any vehicle, other than *your* (Margaret Chance) *covered auto*, which is:
 - a. owned by *any family member* (Joseph Chance); or
 - b. furnished for the regular use of any *family member* (Joseph Chance).

However, this exclusion (B.2) does not apply to your (Margaret Chance) maintenance or use of any vehicle which is:

- a. owned by a *family member* (Joseph Chance); or
- b. furnished for the regular use of a *family member* (Joseph Chance).

(Emphasis added).

Alternatively, if Joseph Chance is substituted for “you” and “your” and Margaret Chance is substituted for “family member”, these provisions read as follows:

- B. We do *not* provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than *your* (Joseph Chance) *covered auto*, which is:
 - a. owned by you (Joseph Chance) or
 - b. furnished for your (Joseph Chance) regular use.
2. Any vehicle, other than *your* (Joseph Chance) *covered auto*, which is:
 - a. owned by *any family member* (Margaret Chance); or
 - b. furnished for the regular use of any *family member* (Margaret Chance).

However, this exclusion (B.2) does not apply to your (Joseph Chance) maintenance or use of any vehicle which is:

- a. owned by a *family member* (Margaret Chance) or
- b. furnished for the regular use of a *family member* (Margaret Chance).

(Emphasis added).

GUILFORD COUNTY EX REL. GARDNER v. DAVIS

[123 N.C. App. 527 (1996)]

Under both readings, coverage is excluded in regard to Joseph Chance's ownership, maintenance, or use of the 1990 Chevrolet truck, a vehicle owned by him and not a covered auto under the policy. Under neither scenario would Joseph Chance be subject to the B.2 exception.

We dealt with similar facts and nearly identical policy provisions in *North Carolina Farm Bureau Mutual Insurance Co. v. Walton*, 107 N.C. App. 207, 418 S.E.2d 837 (1992) and *Kruger v. State Farm Mutual Auto Insurance Association*, 102 N.C. App. 788, 403 S.E.2d 571 (1991). We find that the decisions in *Walton* and *Kruger* are applicable to the case at bar. In accordance with these cases, coverage is excluded under the policy.

For the reasons stated, summary judgment in favor of defendant Allstate Insurance Company is affirmed.

Affirmed.

Judges EAGLES and McGEE concur.

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT, EX REL. JANET HARMON GARDNER, PLAINTIFF-APPELLEE v. JOHN ROBERT DAVIS, DEFENDANT-APPELLANT

No. COA95-1087

(Filed 6 August 1996)

1. Judgments § 208 (NCI4th)— collateral estoppel applicable—action not barred

Collateral estoppel rather than *res judicata* was properly applied in this case, since there was no mutuality of parties between the prior action and this one, and there was a clear difference in the cause of action in the prior suit for divorce and in this suit to establish parentage; however, defendant failed to show that collateral estoppel was a bar to the current action where the parentage of the child was not litigated in the prior action, and the paragraph in the divorce judgment identifying plaintiff's husband as the father of the child was based purely

GUILFORD COUNTY EX REL. GARDNER v. DAVIS

[123 N.C. App. 527 (1996)]

upon the presumption of paternity raised by the child's birth during wedlock.

Am Jur 2d, Judgments §§ 897-943.

2. Illegitimate Children § 7 (NCI4th)— paternity in issue— blood tests ordered by court—no error

The trial court did not err in ordering defendant to submit to a blood grouping test to determine whether he was the parent of the minor child in question where defendant admitted that he had had sexual relations with the mother at the approximate time of the conception, and the unchallenged blood evidence in this case demonstrated that the mother's husband was not the father of the child.

Am Jur 2d, Illegitimate Children § 73.

Blood grouping test. 46 ALR2d 1000.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights. 87 ALR4th 572.

Appeal by defendant from orders entered 31 May 1995 and 3 August 1995 by Judge Donald L. Boone in Guilford County District Court. Heard in the Court of Appeals 15 July 1996.

Deputy County Attorney Gregory L. Gorham for plaintiff-appellee.

Douglas, Ravenel, Hardy & Crikfield, LLP, by G. S. Crikfield and Kim R. Bonuomo, for defendant-appellant.

JOHNSON, Judge.

Pursuant to North Carolina General Statutes Section 110-130.1, plaintiff Guilford County Child Support Enforcement Unit (County) filed an action on behalf of Janet Harmon Gardner (Gardner) against defendant alleging that he is the father of Gardner's minor child. Attached to the complaint is the child's birth certificate, which names Clifford J. Ellis (Ellis) as the father of the child. Ellis was married to Gardner at the time of the child's birth. Also attached to the complaint is a copy of a paternity evaluation performed by Genetic Design

GUILFORD COUNTY EX REL. GARDNER v. DAVIS

[123 N.C. App. 527 (1996)]

which concluded that Ellis could not be the biological father of the minor child.

Defendant answered the complaint moving for dismissal of the action based on the doctrine of *res judicata*, relying on Gardner's and Ellis' uncontested divorce judgment dated 28 December 1992 in which Ellis is named as the father of the child.

On 31 May 1995, an order was entered denying defendant's motion to dismiss. On 3 August 1995, the trial court entered an order requiring defendant to submit to a blood test in order to determine whether defendant is the biological father of the minor child. Defendant appeals both the order denying his motion to dismiss and the order requiring him to submit to a blood test.

Normally, no appeal will lie from an interlocutory order which does not deprive defendant of a substantial right which he would lose if the order or ruling is not reviewed before final judgment. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). Generally, the denial of a motion to dismiss for failure to state a claim upon which relief may be granted does not affect a substantial right of the moving party. *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 90 N.C. App. 738, 370 S.E.2d 76 (1988). Further, an order requiring parties and their minor child to submit to blood grouping testing does not affect a substantial right and is, therefore, interlocutory and not appealable. *Heavner v. Heavner*, 73 N.C. App. 331, 326 S.E.2d 78, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). In our discretion, however, we will address the merits of this case in order to expedite the decision in the public interest. *See Person County ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985).

[1] We note that defendant in his answer relied upon the doctrine of *res judicata* as a bar to plaintiff's claim. However, in his arguments to this Court, he relies upon the doctrine of collateral estoppel as his shield against the order of the trial court. As some confusion appears to exist regarding the applicable doctrine in this case, we address that issue first.

"*Res Judicata*, or claim preclusion, prevents a party, or one in privity with that party, from suing twice on the same claim or cause of action when a final judgment on the merits was entered in the first suit." *State v. Lewis*, 63 N.C. App. 98, 102, 303 S.E.2d 627, 630 (1983), *aff'd*, 311 N.C. 727, 319 S.E.2d 145 (1984). Collateral estoppel, or issue

GUILFORD COUNTY EX REL. GARDNER v. DAVIS

[123 N.C. App. 527 (1996)]

preclusion, has traditionally barred "the relitigation of specific issues actually determined in a prior action between the same parties or their privies. The key question always concerns the issue(s) *actually litigated and decided* in the original action. Consequently, collateral estoppel may be raised in a subsequent action even though that action involved a claim for relief or cause of action different from the first." *Id.* at 102, 303 S.E.2d at 630.

Therefore, for *res judicata* to apply in the instant case, defendant would have to show that the uncontested divorce suit resulted in a final judgment on the merits, that the same cause of action is involved in the current suit, and that both he and the County were either parties or stand in privity with parties. In order for defendant to assert a bar based on the doctrine of collateral estoppel, he must demonstrate that the divorce suit resulted in a final judgment on the merits, that the issue in question in the current suit was identical to an issue actually litigated and necessary to the divorce judgment, and that both he and the County were parties or in privity with parties in the first action.

As demonstrated above, the requirement of mutuality of the parties is included in both doctrines. However, our Courts have carved out exceptions to the mutuality requirement in certain cases applying collateral estoppel. *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986). Therefore, since the mutuality of parties is not always necessary in cases of collateral estoppel, and since there is a clear difference in the cause of action in a suit for divorce versus a suit to establish parentage, the doctrine of collateral estoppel is properly applied in this case. We next apply the facts in this case to the rules of the doctrine.

As stated above, for defendant to prevail on his assertion of collateral estoppel as a bar to the current action, first he must show that the divorce action resulted in a final judgment on the merits. Defendant has made this showing as a final judgment of divorce was entered on 28 December 1992. The second showing required of defendant is that the parentage of the minor child was an issue actually litigated and necessary to the divorce judgment. Defendant has failed to make this showing.

A child born in wedlock is presumed to be legitimate. *Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968). In this case, the inclusion in the divorce judgment of the paragraph identifying Ellis as the father of the minor child was based purely upon

GUILFORD COUNTY EX REL. GARDNER v. DAVIS

[123 N.C. App. 527 (1996)]

the presumption of paternity raised by the child's birth during wedlock. The issue was not the subject of litigation, and no evidence tending to prove parentage other than the existing presumption was presented.

Further, the paragraph in question operates only to identify the existence of a child born of the marriage, and was not necessary to the adjudication of divorce. North Carolina General Statutes Section 50-6 states that parties may apply to dissolve a marriage upon showing that "the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months." N.C. Gen. Stat. § 50-6 (1995). No other requirement is included in the statute. *Id.* The divorce complaint filed in this case clearly relies on North Carolina General Statutes Section 50-6 as the grounds for seeking a final judgment of divorce, and was granted solely on that basis.

For these reasons, we find that defendant may not rely on the 28 December 1992 judgment of divorce as an adjudication of Ellis as the biological father of the minor child, as that judgment merely relies upon the presumption of legitimacy. Because defendant may not apply the doctrine of collateral estoppel to bar plaintiff's action, the trial court did not err in denying defendant's motion to dismiss.

[2] Further, the trial court did not err in ordering defendant to submit to a blood grouping test. The presumption of the legitimacy of a child born in wedlock is rebuttable, and may be rebutted by competent evidence resulting from a blood grouping test administered by a qualified physician or agency. *See Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972). The blood test evidence presented in this case is unchallenged and demonstrates that Ellis is not the father of the minor child. Moreover, defendant admitted in his answer to the complaint that he had sexual relations with Gardner at the approximate time of conception. Accordingly, in furtherance of the purposes stated in North Carolina General Statutes Section 110-128, the trial court did not err in ordering defendant to submit to a blood grouping test to determine whether he is the parent of the minor child. N.C. Gen. Stat. § 110-128 (1995).

For these reasons, we affirm the orders of the trial court.

Affirmed.

Judges WYNN and SMITH concur.

STANLEY & ASSOCIATES v. RISK AND INS. BROKERAGE CORP.

[123 N.C. App. 532 (1996)]

G. ADRIAN STANLEY & ASSOCIATES, INC. PLAINTIFF, v. RISK AND INSURANCE
BROKERAGE CORP., DEFENDANT AND THIRD-PARTY PLAINTIFF v. SMITH YORK &
COMPANY, INC., THIRD-PARTY DEFENDANT

No. COA95-1077

(Filed 6 August 1996)

**Contracts § 106 (NCI4th); Negotiable Instruments and Other
Commercial Paper § 112 (NCI4th)— action on promissory
note—new rate not negotiated—old note valid—principal
due upon default**

The trial court properly granted summary judgment for plaintiff in its action to recover the accelerated balance due on a promissory note executed in the sale of insurance business where defendant, upon discovering that the commissions it earned were significantly less than those projected, unilaterally ceased making payments on the note rather than exercising its right under a commission warranty to have a new note substituted for the original note in an adjusted amount and a new note for the deficiency amount executed by plaintiff to the third-party defendant.

**Am Jur 2d, Bankruptcy § 2408; Bills and Notes
§§ 294-296, 852, 1047.**

**What is essential to exercise of option to accelerate
maturity. 5 ALR2d 968.**

**Acceptance of past-due interest as waiver of accelera-
tion clause in note or mortgage. 97 ALR2d 997.**

Appeal by plaintiff from judgment entered 16 May 1995 by Judge Jack A. Thompson in Wake County Superior Court. Heard in the Court of Appeals 21 May 1996.

*Everett, Gaskins, Hancock & Stevens, by Paul C. Ridgeway, for
plaintiff appellee.*

*Teague, Campbell, Dennis & Gorham, L.L.P., by George H.
Pender, for defendant appellant Risk and Insurance Brokerage
Corp.*

SMITH, Judge.

Defendant Risk and Insurance Brokerage Corporation (RAI) appeals the trial court's entry of summary judgment in favor of

STANLEY & ASSOCIATES v. RISK AND INS. BROKERAGE CORP.

[123 N.C. App. 532 (1996)]

plaintiff G. Adrian Stanley & Associates, Inc. (Stanley). Judgment was entered against RAI in the amount of \$261,433.67. We affirm.

Relevant factual and procedural information is as follows: On 1 April 1989, Stanley entered into a sales agreement with third-party defendant, Smith York & Company (Smith York), in which Stanley sold its book of insurance business to Smith York. On 7 June 1991, Smith York sold a substantial part of the business bought from Stanley to RAI.

In the contract of sale from Smith York to RAI, it was acknowledged that Smith York had three outstanding promissory notes payable to Stanley in the total amount of \$263,441.73. The contract between Smith York and RAI provided that a note for the balance due from RAI to Smith York in the amount of \$227,040.00 would be given to Stanley to apply against the debt owed from Smith York to Stanley. In the promissory note issued to Stanley as partial payment for the note from Smith York to Stanley, RAI agreed to make eighty-four equal consecutive payments of \$3,595.52 to Stanley. The promissory note incorporated the terms and conditions of the contract for sale between RAI and Smith York. Based upon the contract for sale, Smith York was to pay the balance of the debt it owed to Stanley by the time of closing with RAI.

The contract for sale had a price adjustment mechanism which provided that, if the guaranteed commission income amount projected by Smith York was not realized by RAI under the terms of the Commission Warranty, then a new note, substituted for the original note, would be issued to Stanley by RAI in the proper adjusted amount and the original note would be marked "Paid by substitution of note dated ____." Smith York would then execute a new note to Stanley for the deficiency amount.

Apparently, the commission income realized by RAI was significantly less than that projected by Smith York; and in November, 1992, RAI unilaterally determined that it would cease payments to Stanley. In a 22 January 1993 letter to Stanley's attorney, RAI explained that based upon the price adjustment for the decline in expected commissions, RAI owed Stanley less money than the amount recited in the original promissory note and that, based upon the amount RAI had previously paid Stanley per month, RAI was "paid up through approximately the 42nd payment, which will not be due for some time." Neither Smith York nor RAI ever issued a new promissory note to

STANLEY & ASSOCIATES v. RISK AND INS. BROKERAGE CORP.

[123 N.C. App. 532 (1996)]

Stanley in accordance with the provisions contained in the contract between Smith York and RAI.

Stanley instituted this action against RAI on 4 May 1993 seeking to recover the amount owed pursuant to the terms of the promissory note. In February 1995, RAI and Stanley moved for summary judgment. On 16 May 1995, the trial court granted Stanley's motion for summary judgment finding that there were no genuine issues as to any material fact and that Stanley was entitled to judgment as a matter of law against RAI for the amount owed pursuant to the promissory note between those parties. From that judgment, RAI appeals.

A motion for summary judgment should be granted if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact for trial and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 449 S.E.2d 240 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). On appellate review of the order for summary judgment, we take the evidence in the light most favorable to the nonmoving party. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986). After reviewing the forecast of evidence in the record, we agree with the trial court that there are no genuine issues of material fact present in this case as between plaintiff and defendant and affirm the trial court's order.

The terms of the promissory note, a bilateral contract between RAI and Stanley, which incorporate the terms of the contract of sale between Smith York and RAI, provide that in the event of default in payment of the note, the entire principal sum shall become due and payable at Stanley's option. Pursuant to the promissory note and contract for sale, RAI is required to make eighty-four consecutive monthly payments of \$3,595.52 to Stanley. Such terms, according to the promissory note and incorporated contract for sale, are enforceable until new promissory notes have been negotiated by the parties. The parties agreed that new promissory notes would be issued if three conditions precedent were met: (1) the commission guaranteed by Smith York is not realized by RAI; (2) RAI issues a new note to Stanley to replace the original note reflecting the proper adjusted amount; and (3) Smith York executes a new note for the deficiency amount payable to Stanley. Until these conditions are met, the old promissory note is a valid and enforceable contract between RAI and Stanley.

STANLEY & ASSOCIATES v. RISK AND INS. BROKERAGE CORP.

[123 N.C. App. 532 (1996)]

By unilaterally stopping payments to Stanley, RAI breached the terms of the promissory note which require RAI to make eighty-four consecutive monthly payments of \$3,595.52 to Stanley. "A party to a contract may not, by his unilateral declaration, extraneous to the contract, free himself from or limit his liability for damages for his breach of it." *Gore v. Ball, Inc.*, 279 N.C. 192, 201, 182 S.E.2d 389, 394 (1971).

The burden is upon RAI, not Stanley, to show that the conditions precedent have been met and that new promissory notes have been issued pursuant to the terms of the contract for sale and promissory note from RAI to Stanley. See *Russell v. Boice Hardwood Co.*, 200 N.C. 210, 156 S.E. 492 (1931). For an alteration to a contract to be enforceable, there must be an agreement between the parties that the terms of the contract should be altered. *Klein v. Insurance Co.*, 289 N.C. 63, 220 S.E.2d 595 (1975). RAI has not shown that Stanley agreed that the promissory note from RAI to Stanley should be altered or modified. "Mutual consent is as much a requisite in effecting a contractual modification as it is in the initial creation of the contract." *Electro Lift v. Equipment Co.*, 4 N.C. App. 203, 207, 166 S.E.2d 454, 457 (1969).

It is RAI's duty to negotiate with Smith York until those parties reach an agreement as to the proper purchase price adjustment. After such agreement, RAI and Smith York must then issue new notes to Stanley, such that Stanley's position will remain the same, that is, in possession of valid promissory notes for the full amount which it is owed. Only after new promissory note terms have been established may RAI pay Stanley less than that agreed upon between the parties in the original promissory note.

For the reasons stated, the order of the trial court granting summary judgment in plaintiff's favor is

Affirmed.

Judges EAGLES and WYNN concur.

NATIONWIDE MUTUAL INS. CO. v. INTEGON INDEMNITY CORP.

[123 N.C. App. 536 (1996)]

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF V. INTEGON INDEMNITY CORPORATION, JACKIE BROADIE, TIMOTHY S. WARD, PEGGY T. WARD, AND RICKY VAN WOOD, ADMINISTRATOR OF THE ESTATE OF LYNDA HUDSON WOOD, DEFENDANTS

No. COA95-1205

(Filed 6 August 1996)

Insurance § 822 (NCI4th)—homeowners policy—applicability of motor vehicle exclusion—damages resulting from “use” of vehicle

Plaintiff's homeowners liability policy excluded coverage for liability in an underlying wrongful death action arising from an automobile accident where defendant was towing a metal livestock trailer which was improperly connected to the truck defendant was driving; the trailer became disconnected and crossed the centerline, striking an oncoming car and resulting in the driver's death; and the damages resulted solely from defendant's “use” of the truck in towing the trailer and not any independent “non-automotive” cause.

Am Jur 2d, Insurance § 727.

Appeal by plaintiff from order entered 30 August 1995 by Judge Knox V. Jenkins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 June 1996.

Bailey & Dixon, L.L.P., by David S. Coats, for plaintiff-appellant.

Barnes, Braswell & Haithcock, P.A., by R. Gene Braswell, for defendant-appellee Ricky Van Wood, Administrator of the Estate of Lynda Hudson Wood.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Michael M. Jones, for defendant-appellee Jackie Broadie.

MARTIN, John C., Judge.

This declaratory judgment action arises out of a collision which occurred when a metal livestock trailer, towed by a truck owned by defendant Peggy Ward and driven by defendant Timothy Ward, became detached from the truck, crossed the centerline of the road, and struck an automobile driven by Lynda Hudson Wood. Lynda Wood

NATIONWIDE MUTUAL INS. CO. v. INTEGON INDEMNITY CORP.

[123 N.C. App. 536 (1996)]

died as a result of the collision. The livestock trailer was owned by defendant Broadie who had loaned it to Timothy Ward. Defendants Ward are insured by an automobile liability policy issued by plaintiff as well as a homeowners insurance policy covering their home in Wayne County; defendant Broadie is insured under an automobile liability policy issued by defendant Integon Indemnity Corporation.

Ricky Van Wood, the administrator of Lynda Wood's estate, brought a civil action against the Wards and Broadie seeking damages for the wrongful death of Lynda Wood. The administrator alleged that Timothy Ward was negligent in the manner in which he operated the truck and in the manner in which he loaded and secured the trailer.

Because the Estate contended that the homeowners policy issued by plaintiff to the Wards provides coverage, in addition to that provided by the automobile liability policies, for the damages sought in the wrongful death action, plaintiff brought this declaratory judgment action seeking a determination of its obligations under the homeowners policy. Plaintiff asserted that the occurrence is excluded from the liability coverage provided by its homeowners policy. The homeowners policy at issue provides personal liability insurance coverage to "an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies . . ." The policy also provides, however, the following exclusions.

SECTION II—EXCLUSIONS

1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage: . . .

e. arising out of:

(1) the ownership, maintenance, use, loading, or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured; . . .

This exclusion does not apply to:

(1) a trailer not towed by or carried on a motorized land conveyance; . . .

(4) a vehicle or conveyance not subject to motor vehicle registration which is:

(a) used to service an insured's residence; . . .

NATIONWIDE MUTUAL INS. CO. v. INTEGON INDEMNITY CORP.

[123 N.C. App. 536 (1996)]

Plaintiff contended the homeowners liability policy excludes coverage for liability in the underlying action because the damages “ar[ose] out of the ownership, maintenance, use, loading or unloading” of a motor vehicle.

Both plaintiff and defendant Estate moved for summary judgment. The trial court concluded that coverage was provided by plaintiff’s homeowners liability policy, denied plaintiff’s motion for summary judgment, and granted summary judgment for defendant Estate. Plaintiff appealed and we reverse.

Our Supreme Court has established two principles governing the construction of liability coverage provisions contained in homeowners insurance policies:

(1) ambiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability. Stating the second principle in reverse, the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy.

State Capital Ins. Co. v. Nationwide Mutual Ins. Co., 318 N.C. 534, 546, 350 S.E.2d 66, 73 (1986). This Court applied the foregoing two principles in *Nationwide Mutual Ins. Co. v. Davis*, 118 N.C. App. 494, 455 S.E.2d 892, *disc. review denied*, 341 N.C. 420, 461 S.E.2d 759 (1995), to determine whether a homeowner’s policy provided coverage for the insured’s granddaughter’s injuries suffered after the child had exited the insured’s van. This Court found that the “use” of the van was not the sole proximate cause of the accident and that a concurrent cause was the grandmother’s negligent supervision of the child. *Id.* at 501, 455 S.E.2d at 896. We held that because there was a “‘non-automobile proximate cause’ of the accident, the automobile exclusion does not apply to bar coverage under the homeowner’s policy.” *Id.*

In the present case, the evidentiary materials in the record tend to show that on the date of the accident, defendant Timothy Ward was towing the metal livestock trailer behind Peggy Ward’s 1979 Chevrolet truck. The truck had a towing ball, but the towing ball was not secured to the vehicle, and the safety chains on the trailer were not

NATIONWIDE MUTUAL INS. CO. v. INTEGON INDEMNITY CORP.

[123 N.C. App. 536 (1996)]

used or attached to the truck. The trailer subsequently became disconnected from the truck, crossed the center line of the highway, and struck Lynda Wood's car, resulting in her death. The complaint in the underlying wrongful death lawsuit alleges Timothy Ward's negligence in the operation of the truck, in exceeding a safe speed when towing an improperly loaded and secured trailer, and in "improperly load[ing] the trailer without regard to the danger in towing it"

Coverage existed in *Davis* because the negligent supervision of the child was an act of negligence separate from the use of the vehicle. In this case, however, the defendant Estate's damages are alleged to have resulted solely from Timothy Ward's "use" of the truck in towing the trailer, and not any independent "non-automotive" cause. His alleged negligence in attaching, securing and towing the trailer could not have caused damages that were independent of the "use" of the truck itself. The homeowners liability policy expressly excepts liability arising in connection with the "use" of motor vehicles. The damages, therefore, arose outside the scope of coverage, under the plain language of the homeowners policy.

Defendant Estate argues that the trailer is a "vehicle or conveyance not subject to motor vehicle registration," as described in section (4)(a), and is therefore not subject to the exclusion. Nonetheless, the exclusion still applies because the accident, and therefore the damages to the Estate, arose out of, and could not have occurred without, the "use" of the truck.

We therefore hold that any damages arising out of the underlying lawsuit are excluded, by the motor vehicle exclusion, from the scope of the personal liability coverage provided by the Wards' homeowners policy. Accordingly, we reverse the trial court's grant of summary judgment for defendant Estate and remand this case for the entry of summary judgment for plaintiff on this issue. Because we have determined that the motor vehicle exclusion precludes coverage, we do not address plaintiff's contention that the business pursuit exclusion applies.

Reversed.

Judges GREENE and WALKER concur.

MANLEY v. PARKER

[123 N.C. App. 540 (1996)]

DEMOND ANTONIO MANLEY, A MINOR CHILD BY AND THROUGH HIS GUARDIAN AD LITEM, BETTY MANLEY, PLAINTIFFS v. MICHAEL D. PARKER, PUBLIC ADMINISTRATOR FOR THE ESTATE OF CYNTHIA MELVIN PHILLIPS, A.K.A. CYNTHIA DARLENE EADES MELVIN PHILLIPS AND BROADWAY YELLOW CAB COMPANY, INC., DEFENDANTS

No. COA95-217

(Filed 6 August 1996)

Automobiles and Other Vehicles § 550 (NCI4th)— child struck by vehicle—no evidence that defendant should have seen plaintiff—directed verdict proper

The trial court properly directed verdict for defendant in an action to recover for injuries received by the seven-year-old plaintiff when he was struck by a vehicle driven by defendant where the evidence tended to show that defendant was traveling below the posted speed limit; defendant told the arresting officer that plaintiff suddenly stepped out into her path; there was no evidence that she left her proper lane of travel; even if defendant had a heightened duty to keep a proper lookout because she saw a young girl by the roadside or even if she was improperly distracted by the girl, there was no evidence that, in the exercise of due care, defendant should have seen the plaintiff in time to avoid the accident; and there was only speculation, not evidence, concerning whether defendant should have seen plaintiff and could have avoided the accident.

Am Jur 2d, Automobile and Highway Traffic § 516.

Appeal by plaintiff from order entered 22 September 1994 by Judge D. Jack Hooks, Jr. in Durham County Superior Court. Heard in the Court of Appeals 16 November 1995.

On 23 November 1985, plaintiff Demond Antonio Manley suffered a broken arm, broken collarbone, and cuts and scrapes after being struck by a taxicab operated by Cynthia Melvin Phillips. Plaintiff, then age seven, and his sister, then age eleven, had been selling candy for a school fundraising project. Their mother had given them permission to sell the candy in their Durham neighborhood and had suggested they should try a convenience store at the corner of Trent Drive and Main Street. Instead, the children decided to try to sell the candy at businesses along Hillsborough Road. They crossed Hillsborough Road and sold some candy at Rigsbee Tire Company. As

MANLEY v. PARKER

[123 N.C. App. 540 (1996)]

they were leaving, someone inside called the sister to return, saying they wished to purchase more candy. While his sister made the additional sale, plaintiff recrossed the street in order to go to another business on the other side. After crossing the street, plaintiff continued walking alongside the street with his back to oncoming traffic.

Upon leaving the tire store, plaintiff's sister waited for several cars to pass before attempting to recross the street. When she failed to see her brother where she expected him to be, she crossed the street and found plaintiff lying beside the road. She immediately ran home to get her mother. Plaintiff's sister testified she did not see her brother get struck by a car. Plaintiff testified he did not remember being hit by a vehicle, he never saw the vehicle that hit him, and could not say if he was in the roadway or on the side of the road at the time he was hit. Durham Police Officer J.M. Cates, a member of the traffic services division and the investigating officer at the scene, testified Phillips, the driver of the cab, told him she was travelling at a speed of thirty miles an hour in a thirty-five mile an hour zone when a small boy suddenly stepped out into her path. Officer Cates testified the plaintiff was lying two to three feet from the roadway, with his feet towards the street and his head towards the sidewalk. Based upon his investigation of the vehicle and surrounding area, Officer Cates determined that Phillips' vehicle had not left its proper lane of travel either at or prior to the point of impact.

Plaintiff, through his guardian *ad litem*, originally filed this negligence action against Phillips and her employer, Broadway Yellow Cab Company, Inc., on 18 November 1988. After taking a voluntary dismissal, plaintiff refiled his claim against the defendants in February 1991. Phillips died before the case came to trial. At the close of plaintiff's evidence at trial, defendants moved for a directed verdict. The trial court granted defendants' motion in an order issued 22 September 1994. From this order, plaintiff appeals.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellant.

Newsome, Graham, Hedrick & Kennon, P.A., by Joel M. Craig, for defendant-appellees.

McGEE, Judge.

The determining issue on appeal is whether plaintiff presented sufficient evidence to overcome defendants' motion for a directed

MANLEY v. PARKER

[123 N.C. App. 540 (1996)]

verdict. After reviewing the record and transcript, we hold that he did not and affirm the order of the trial court.

The well-settled rule in this state is that a driver who otherwise exercises reasonable care has no duty to foresee the sudden appearance of a child who darts out into a street. *Koonce v. May*, 59 N.C. App. 633, 635-36, 298 S.E.2d 69, 72 (1982). "[T]he rule is that the driver is not the insurer of the safety of children in the street, and that under ordinary circumstances he is not bound to anticipate children in his pathway; a driver has to have enough time to stop or to avoid a collision before his failure to do so can be actionable negligence." *Koonce*, 59 N.C. App. at 636, 298 S.E.2d at 72. "It should be noted that the 'darting children' cases affirming a defendant driver's motion for a directed verdict appear to share a common theme. Generally, the plaintiff in those cases failed to present sufficient evidence on the defendant's ability to avoid the accident." *Phillips v. Holland*, 107 N.C. App. 688, 692, 421 S.E.2d 608, 610 (1992), *affirmed*, 333 N.C. 571, 429 S.E.2d 347 (1993).

In this case, plaintiff failed to produce any evidence that defendant Phillips could have avoided the accident. The only testimony presented showed that neither plaintiff nor his sister saw Phillips' vehicle before the accident and that Phillips told Officer Cates she did not see plaintiff until he darted into her path. Phillips was traveling below the posted speed limit and there was no evidence she left her proper lane of travel. Therefore, plaintiff presented no evidence that Phillips did see him or should have seen him in time to avoid the accident.

However, plaintiff contends he presented evidence creating an issue of material fact from which a jury could find negligence. First, he argues that because Phillips told Officer Cates she saw a young girl, presumably plaintiff's sister, across the street, Phillips was either improperly distracted from keeping a proper lookout and/or had a heightened duty to be on the lookout for children. *See Koonce*, 59 N.C. App. at 636, 298 S.E.2d at 72 ("When a driver knows or should know . . . that there are children on or near a roadway, he has a duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury."). However, even if Phillips had a heightened duty to keep a proper lookout because she saw a young girl by the roadside or even if she was improperly distracted by the girl, there is no evidence in the record that, in the exercise of due care, Phillips should have seen the plaintiff in time to avoid the acci-

MANLEY v. PARKER

[123 N.C. App. 540 (1996)]

dent. Without proof that a defendant's inattention was a proximate cause of a collision with a child and that the defendant could have avoided the accident with the exercise of reasonable care, the defendant is entitled to a directed verdict in her favor, even assuming she failed to keep a proper lookout. *Daniels v. Johnson*, 25 N.C. App. 68, 71, 212 S.E.2d 245, 247 (1975).

Plaintiff also argues that since Officer Cates testified there were no obstructions to a driver's view on the roadway, it can be inferred that Phillips could have seen the child. However, this inference, without more, is insufficient to show negligence. In *Daniels*, this Court held that even though it could be reasonably inferred the defendant could have seen the plaintiff child crossing the street sometime during his crossing, without any evidence of when and where the plaintiff became visible to the defendant in relation to the positions of the two parties, the plaintiff failed to present sufficient evidence to overcome defendant's motion for a directed verdict. *Daniels*, 25 N.C. App. at 70, 212 S.E.2d at 246-47. In so holding, this Court said:

There is no evidence in this record whatsoever as to where the defendant was at any particular time until she apparently applied her brakes five feet before striking the plaintiff. Thus, the evidence adduced at trial does not provide the answer to the crucial question in the case, that is, whether defendant, in the exercise of due care, could have seen the plaintiff in sufficient time to anticipate his collision course and to have taken effective measures to avoid striking him. Left to speculation is where the defendant was when she saw or by the exercise of reasonable care should have seen the plaintiff.

Id. Here, as in *Daniels*, there is only speculation, not evidence, concerning whether defendant should have seen the plaintiff and could have avoided the accident.

For the reasons stated, the order of the trial court granting defendants' motion for a directed verdict is affirmed.

Affirmed.

Judges GREENE and MARTIN, Mark D. concur.

ENZOR v. N.C. FARM BUREAU MUT. INS. CO.

[123 N.C. App. 544 (1996)]

WILLIAM IRVIN ENZOR, SR., PLAINTIFF V. NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA95-568

(Filed 6 August 1996)

Insurance § 815 (NCI4th)— value of crop lost to fire—computation of actual cash value proper—failure of court to instruct appraisers proper—report inadequately signed

In a dispute between plaintiff sweet potato farmer whose crop was destroyed by fire and defendant insurance company over the actual cash value of the sweet potatoes, the trial court was not required to instruct the umpire and appraisers on the proper method for determining the actual cash value of the crop. However, the trial court erred by incorporating the umpire's report into its judgment where the appraisal report was invalid because it was signed only by the umpire and the policy appraisal procedure required a written award of any two of the appraisers and umpire.

Am Jur 2d, Insurance §§ 1680 et seq.

Remedies of insured other than direct action on policy where fire and other property insurer refuses to comply with policy provisions for appointment of appraisers to determine amount of loss. 44 ALR2d 850.

Time within which demand for appraisal of property loss must be made, under insurance policy providing for such appraisal. 14 ALR3d 674.

Insurance: Necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of loss. 25 ALR3d 680.

Appeal by defendant from orders entered 2 November 1994 and 7 December 1994 by Judge William C. Gore, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 23 February 1996.

McGougan, Wright, Worley & Harper, by Dennis T. Worley, for plaintiff-appellee.

Anderson, Cox & Ennis, by J. Thomas Cox, Jr., for defendant-appellant.

ENZOR v. N.C. FARM BUREAU MUT. INS. CO.

[123 N.C. App. 544 (1996)]

LEWIS, Judge.

This appeal arises from a dispute between plaintiff, a sweet potato farmer, and defendant North Carolina Farm Bureau Mutual Insurance Company, plaintiff's insurer, over the actual cash value of his sweet potatoes.

Plaintiff's potatoes were destroyed by fire on 8 February 1991 in Columbus County, N.C. The produce was insured in a policy issued by defendant. The policy contained standard fire insurance policy provisions required by N.C. Gen. Stat. section 58-44-15 (1994). After attempts by the parties to settle failed, plaintiff filed suit on 10 January 1992 and defendant answered.

In September 1993, Judge Orlando F. Hudson ordered that the actual cash value of plaintiff's 1990-1991 sweet potato crop be determined by the appraisal method as set out in the policy. Pursuant to this order, the parties each chose an expert appraiser but were unable to agree on a disinterested umpire as set forth in the policy. By order entered 19 January 1994, Judge William C. Gore, Jr. appointed an umpire, attorney Lewis Sauls, to join the two disinterested appraisers in determining the actual cash value of plaintiff's crop in accordance with the policy provisions. On 30 August 1994, Umpire Lewis Sauls filed a report. By order entered 2 November 1994, Judge Gore adopted this report and awarded plaintiff \$114,777.88 plus interest. On 16 November 1994, defendant made motions for a new trial and for amended and additional findings of fact. By order entered 7 December 1994, the trial court denied these motions. Defendant appeals.

We first address a preliminary matter. In his brief, plaintiff asks this Court to award him the costs of this appeal and asserts that the appeal is in violation of N.C.R. Civ. P. 11. Since plaintiff has not made this request in a motion pursuant to N.C.R. App. P. 37, we decline to consider his request. See *Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988).

Defendant asserts that the trial court erred by incorporating an invalid umpire's report into its judgment. Defendant first contends that the umpire's report is invalid because it fails to follow the insurance policy provision governing the computation of actual cash value recoverable. We disagree.

If the contractual appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud,

ENZOR v. N.C. FARM BUREAU MUT. INS. CO.

[123 N.C. App. 544 (1996)]

duress, or other impeaching circumstances. *McMillan v. State Farm Fire and Casualty Co.*, 93 N.C. App. 748, 751-52, 379 S.E.2d 88, 90 (citing *Young v. New York Underwriters Ins. Co.*, 207 N.C. 188, 192, 176 S.E. 271, 273 (1934)), *disc. review denied*, 325 N.C. 272, 384 S.E.2d 516 (1989). Defendant has not presented evidence of fraud, duress, or other impeaching circumstances. Thus, if the appraisal policy procedure was followed, the report is valid.

Defendant next contends that the trial court erred by failing to instruct the umpire and appraisers on the proper method for determining actual cash value. We disagree. As mandated by G.S. section 58-44-15, the policy provides:

Appraisal In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss

The policy appraisal procedure does not require the trial court to give instructions to the umpire and appraisers. This policy appraisal procedure is analogous to an arbitration proceeding. In arbitration, “‘errors of law or fact . . . are insufficient to invalidate an award fairly and honestly made.’” *Turner v. Nicholson Properties, Inc.*, 80 N.C. App. 208, 212, 341 S.E.2d 42, 45 (1986) (quoting *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 411, 255 S.E.2d 414, 417-18 (1979)), *disc. review denied*, 317 N.C. 714, 347 S.E.2d 457 (1986). We conclude that the trial court did not err by failing to instruct the appraisers and umpire in the manner sought by defendant.

Defendant also assigns error to the trial court’s denial of its motion for additional findings of fact. After review, we conclude that the trial court’s findings were adequate. This assignment of error is overruled.

CARTER v. NORTHERN TELECOM

[123 N.C. App. 547 (1996)]

Defendant further contends that the appraisal procedure was not followed as the report was signed only by the umpire. We agree. The policy appraisal procedure clearly requires an “award in writing . . . of any two” of the appraisers and umpire. Since the umpire’s signature alone fails to demonstrate that at least one other appraiser concurred in the award, the appraisal award does not comply with the policy appraisal procedure and is thereby invalid. The trial court erred by incorporating this report, without the necessary signatures, into its 2 November 1994 order.

The dispute was initially submitted to an umpire and appraisers for resolution pursuant to the policy appraisal procedure. On remand, the court should resubmit the umpire’s award to the umpire and appraisers for the necessary signatures. Once a valid appraisal report is prepared, the trial court should then enter judgment accordingly. If the necessary signatures cannot be obtained, the matter shall be submitted to the court for resolution by trial or otherwise.

Reversed and remanded.

Judges GREENE and SMITH concur.



SELITA CARTER, EMPLOYEE, PLAINTIFF v. NORTHERN TELECOM, EMPLOYER, LIBERTY
MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA96-46

(Filed 6 August 1996)

Workers’ Compensation § 114 (NCI4th)— employee’s condition not related back to injury—sufficiency of evidence

The evidence was sufficient to support the Industrial Commission’s conclusion that plaintiff’s condition did not relate back to her compensable on-the-job injury and that she was not entitled to further benefits where it tended to show that her current condition was the result of an automobile accident in which she injured both shoulders and one arm, rather than the job related injury where she injured her right arm.

Am Jur 2d, Workers’ Compensation § 269.

CARTER v. NORTHERN TELECOM

[123 N.C. App. 547 (1996)]

Appeal by plaintiff from Opinion and Award entered 22 September 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 July 1996.

Perry & Brown, by Cedric R. Perry and Stephanie J. Brown, for plaintiff appellant.

Maupin Taylor Ellis & Adams, P.A., by John D. Elvers, for defendant appellees.

ARNOLD, Chief Judge.

Plaintiff suffered a compensable on-the-job injury to her upper right extremity on 11 August 1992, for which defendants admitted liability. Following an office visit on 16 December 1992, plaintiff's physician anticipated that plaintiff would return to work in January of 1993. However plaintiff sustained injuries to both shoulders and her right arm in an automobile accident on 26 December 1992. As a result, plaintiff did not return to work, and her employment was eventually terminated. Defendants discontinued temporary total disability payments to plaintiff as of 15 January 1993, and plaintiff subsequently filed a workers' compensation claim against defendant-employer.

Following a hearing on 12 July 1994, Deputy Commissioner Tamara R. Nance denied plaintiff's claim in an Opinion and Award filed on 27 February 1995. Plaintiff then appealed to the Full Commission, which heard her claim on 28 June 1995. The record on appeal indicates that the Full Commission made the following relevant findings of fact:

4. In December 1992, plaintiff came under the care of Dr. Barada for her right upper extremity complaints. Dr. Barada diagnosed regional fibromyalgia and rotator cuff strain caused by her activities at work, and prescribed Amitriptyline and exercise. By 16 December 1992, plaintiff was much improved and reported to Dr. Barada that her right hand and wrist were fine, but that she still experienced some right shoulder pain as the day wore on. Dr. Barada injected the right shoulder and opined that plaintiff should be able to return to work in 2 to 4 weeks.

5. On 26 December 1992, plaintiff was involved in an automobile accident in which she sustained injuries to both shoulders and her right arm. This accident significantly aggravated plaintiff's right arm complaints, such that because of the automobile acci-

CARTER v. NORTHERN TELECOM

[123 N.C. App. 547 (1996)]

dent plaintiff was unable to return to work in January 1993 as Dr. Barada had predicted.

....

9. The injury of 11 August 1992 has not rendered plaintiff unable to earn the same wages she was earning at the time of the injury in the same or any other employment since January 1993, when, but for the automobile accident, plaintiff would have been able to return to work for defendant-employer.

10. Plaintiff retains no permanent disability as a result of the injury of 11 August 1992.

On the basis of these and other findings of fact, the Full Commission concluded that:

1. Plaintiff is not entitled to further benefits under the Workers' Compensation Act, inasmuch as she has not been disabled as a result of the injury of 11 August 1992 since the date of last payment of compensation. The key issue in this case revolves around causation rather than current extent of disability, in particular, the question of whether plaintiff's current condition can be sufficiently related back to her original injury or whether the intervening auto accident is responsible for plaintiff's current condition. There is insufficient convincing evidence of record to relate plaintiff's current condition back to her compensable on-the-job injury. As this is the case, the extent of plaintiff's disability becomes irrelevant to her workers' compensation case.

2. Plaintiff is thus not entitled to further benefits under the Workers' Compensation Act.

The Full Commission thereupon denied plaintiff's claim for further compensation. From the Full Commission's Opinion and Award, plaintiff appeals.

Plaintiff contends that the Full Commission erred in finding that her present condition was not proximately caused by her compensable on-the-job injury. In addition she argues both that the Full Commission erred by failing to find that she was permanently disabled, and that defendants failed to offer evidence of her ability to return to work. We disagree and affirm the Full Commission's Opinion and Award.

CARTER v. NORTHERN TELECOM

[123 N.C. App. 547 (1996)]

This Court's jurisdiction in an appeal from the Industrial Commission "is limited to the questions of law as to whether there was competent evidence before the Commission to support its findings of fact. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commissioner is conclusive on appeal." *Hunt v. Scotsman Convenience Store*, 95 N.C. App. 620, 622, 383 S.E.2d 390, 391, *disc. review denied*, 325 N.C. 707, 388 S.E.2d 456 (1989). "[T]he Industrial Commission is the sole judge of the credibility of witnesses and the weight of testimony before the court." *Id.*

In determining whether the aggravation of an injury or a distinct new injury is compensable, a claimant must show that the primary injury arises out of and in the course of employment and that "every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." *Starr v. Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347, *cert. denied*, 277 N.C. 112 (1970) (quoting Larson's Workmen's Compensation Law § 13.00). "When a first cause produces a second cause that produces a result, the first cause is a cause of that result." *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E.2d 321, 328 (1970) (citation omitted).

Dr. George S. Edwards, Jr., who examined plaintiff on 10 August 1994, testified that her "present condition has nothing to do with her work at Northern Telecom." He stated that plaintiff's condition (fibromyalgia) had never been shown to have evolved from an injury and that any tendinitis problems had had ample time to resolve. In addition he asserted that plaintiff's condition was not caused by her work, nor had her job caused "any permanent condition that would be rated with a disability." Dr. Paul H. Wright examined plaintiff on 26 January 1993. After reviewing a note from Dr. Edwards and recent medical records, Dr. Wright agreed Dr. Edwards "may very well be correct" that plaintiff's current symptoms were not related to her employment in any way and that she has no permanent partial disability related to her employment.

Although plaintiff introduced evidence from two other physicians in support of her contention that her current condition was causally related to her compensable on-the-job injury, the Full Commission's findings to the contrary are supported by competent evidence in the record. As noted earlier, if the evidence is capable of supporting two contrary findings, the Full Commission's determination is conclusive

BAKER v. BECAN

[123 N.C. App. 551 (1996)]

on appeal. *See Hunt*, 95 N.C. App. 622, 383 S.E.2d at 391. Given that plaintiff failed to prove causation, the Full Commission did not err in concluding that the extent of her disability was irrelevant.

Affirmed.

Judges GREENE and JOHN concur.

MARGARET LUFFMAN BAKER, PLAINTIFF v. ARTHUR F. BECAN, M.D., STOKES-REYNOLDS MEMORIAL HOSPITAL, INC., AND STOKES-REYNOLDS MEMORIAL HOSPITAL, INC. D/B/A JONES OUTPATIENT CLINIC A/K/A DR. R.J. JONES MEDICAL CENTER, DEFENDANTS

No. COA95-288

(Filed 6 August 1996)

Trial § 213 (NCI4th)— voluntary dismissal—failure to refile within one-year period

The one-year limitation period within which plaintiff might have renewed her claim under N.C.G.S. § 1A-1, Rule 41(a)(1) commenced 7 July 1993, the date plaintiff's counsel stated in open court that he intended to file notice of voluntary dismissal, rather than when the written notice was filed on 12 July 1993; therefore, since plaintiff's second "Application and Order Extending Time to File Complaint" was not filed until 12 July 1994, her claim was barred by the limitations period and was properly dismissed by the trial court.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 9 et seq.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial", "commencement of trial", "trial of the facts" or the like. 1 ALR3d 711.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR4th 778.

BAKER v. BECAN

[123 N.C. App. 551 (1996)]

Appeal by plaintiff from order entered 26 October 1994 by Judge Clarence W. Carter in Stokes County Superior Court. Heard in the Court of Appeals 7 December 1995.

Charles Peed and Associates, by Charles O. Peed, for plaintiff-appellant.

Joseph Edward Downs for defendant-appellee Arthur F. Becan, M.D.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, for defendant-appellees Stokes-Reynolds Hospital, Inc., and Stokes-Reynolds Memorial Hospital, Inc. d/b/a Jones Outpatient Clinic a/k/a Dr. R. J. Jones Medical Center.

JOHN, Judge.

Plaintiff appeals dismissal with prejudice of her medical malpractice complaint against defendants. We affirm the trial court.

Pertinent procedural information is as follows: On 19 March 1993, plaintiff filed an application pursuant to N.C.R. Civ. P. 3(a) to extend the time in which to file complaint against defendants. The clerk of court thereupon issued an order extending the time for filing plaintiff's complaint through 19 April 1993. On 7 April 1993, plaintiff filed a complaint alleging, *inter alia*, that defendant Arthur Becan, M.D., was negligent in the medical treatment of plaintiff's ankle. However, the complaint contained neither prayer for relief nor demand for judgment.

In May 1993, defendants moved to dismiss pursuant to N.C.R. Civ. P. 12(b)(6). Plaintiff subsequently sought amendment of the complaint under N.C.R. Civ. P. 15 for purposes of adding a prayer for relief. The motions were calendared for hearing 7 July 1993 in Stokes County Superior Court. However, according to stipulations in the record, on that date counsel for plaintiff related to the court that "it was his intention to file a written notice of dismissal of the action" and that he planned to prepare such document upon returning to his office. The motions thus were not heard. A hand-written entry on the clerk's calendar for 7 July 1993 reads, "V.D. to be filed by Mr. Peed." Written notice of plaintiff's voluntary dismissal was thereafter filed 12 July 1993.

On 12 July 1994, plaintiff once again filed an "Application and Order Extending Time to File Complaint," and was allowed until 1

BAKER v. BECAN

[123 N.C. App. 551 (1996)]

August 1994 to file her complaint; she filed her second malpractice action 28 July 1994. Defendant Becan thereupon moved to dismiss based upon plaintiff's "(1) failing to state a cause of action; (2) not having filed her cause of action within the applicable 3 year statute of limitations; and (3) failure to recommence her cause of action within one (1) year after having once before voluntarily dismissed her purported cause of action." Defendant Stokes-Reynolds Memorial Hospital, Inc., also moved to dismiss plaintiff's action. Defendants' motions were granted by the trial court in an order filed 26 October 1994. Plaintiff appeals.

Plaintiff brings forth two main assertions on appeal: (1) her first complaint, filed 7 April 1993, was valid despite lack of prayer for relief and was properly filed within the three-year statute of limitations period; (2) the one-year limitation period for refile of plaintiff's claim (dismissed under N.C.R. Civ. P. 41(a)(1) [Rule 41(a)(1)]) began to run 12 July 1993, the date plaintiff's written notice of voluntary dismissal was filed, and therefore her second "Application and Order Extending Time to File Complaint" was timely filed 12 July 1994.

On the other hand, defendants contend plaintiff's original complaint was a nullity due to its lack of prayer for relief and therefore failed to toll the three-year limitations period which (as extended by the clerk) ran 19 April 1993. Defendants further argue that, assuming *arguendo* plaintiff's first claim was properly filed, the one-year period to refile under Rule 41(a)(1) commenced 7 July 1993 and therefore ran prior to plaintiff's refile of her claim 13 July 1994. As we decide plaintiff did not timely refile under Rule 41(a)(1) and therefore defendants' motions to dismiss were properly granted, we need not address whether plaintiff's complaint was effective notwithstanding lack of prayer for relief.

Rule 41(a)(1) provides as follows:

If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal

In this jurisdiction, oral notice in open court of voluntary dismissal operates to commence the one-year limitation period set out in Rule 41(a)(1). *Cassidy v. Cheek*, 308 N.C. 670, 674, 303 S.E.2d 792, 795 (1983); *Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d 161, 163

BAKER v. BECAN

[123 N.C. App. 551 (1996)]

(1980); *Johnson v. Hutchens*, 103 N.C. App. 384, 385, 405 S.E.2d 597, 598 (1991).

Notwithstanding, plaintiff points to *Thompson v. Newman*, 331 N.C. 709, 417 S.E.2d 224 (1992) as support for her position. We find the case inapposite.

In *Thompson*, this Court held:

[W]hen a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to Rule 41(a)(1) to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year period for refiling provided by the rule begins to run when written notice is filed.

Id. at 712, 417 S.E.2d at 225. In the case *sub judice*, there is no evidence the trial court “instruct[ed]” or “expressly permit[t]ed” plaintiff to file written notice of dismissal at a later date. While the statement of plaintiff’s counsel informing the court of his intention to prepare the dismissal document upon returning to his office might arguably imply tacit approval of the court, counsel’s announcement in no way constitutes either “express permission” or “instruction” by the court to file at a later date so as to bring this case within the rubric of *Thompson*. Further, it appears from the record that plaintiff’s written notice of dismissal was filed after the subject session of court had concluded.

In short, the one-year limitation period within which plaintiff might have renewed her claim under Rule 41(a)(1) commenced 7 July 1993, the date plaintiff’s counsel stated in open court that he intended to file notice of voluntary dismissal. As plaintiff’s second “Application and Order Extending Time to File Complaint” was not filed until 12 July 1994, her claim was barred by the limitations period and was properly dismissed by the trial court.

Affirmed.

Judges LEWIS and WYNN concur.

CROUSE v. FLOWERS BAKING CO.

[123 N.C. App. 555 (1996)]

PAMELA LUDLAM CROUSE, PLAINTIFF-EMPLOYEE, v. FLOWERS BAKING COMPANY OF HIGH POINT, DEFENDANT-EMPLOYER, AND SELF-INSURED (PALMER & CAY CARSWELL, ADMINISTRATORS) DEFENDANT-CARRIER

No. COA95-760

(Filed 6 August 1996)

Appeal and Error § 355 (NCI4th)—incomplete record—appeal dismissed

Since a Form 21, which indicates an agreement for compensation, is required to be filed with the Industrial Commission, and it is the appellant's duty and responsibility to see that the record is in proper form and complete, the absence of a Form 21 from the record subjects this appeal to dismissal under N.C.R. App. P. 18(c)(3).

Am Jur 2d, Appellate Review § 488.

Appeal by plaintiff-employee from Opinion and Award entered 12 April 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 March 1996.

Harris & Iorio, by Douglas S. Harris, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, by Laurie R. Stegall, for defendant-appellees.

LEWIS, Judge.

On 21 February 1992, plaintiff requested a hearing before the North Carolina Industrial Commission seeking payment for further medical expenses, continued temporary total disability and permanent partial disability compensation. The parties stipulated to the following facts: On 18 May 1989, plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant-employer, Flowers Baking Company of High Point ("Flowers"). After that date, plaintiff did not return to employment with Flowers. From 18 May 1989 until 27 July 1990, Flowers paid plaintiff \$11,774.73 in temporary total disability benefits.

After making additional findings of fact, the Deputy Commissioner concluded that plaintiff was entitled to temporary total compensation from 18 May 1989 through 6 February 1990. However, since Flowers had already paid these amounts, he ruled that plaintiff was not entitled to any further temporary total compensation. Additionally, he concluded that plaintiff was not entitled to any per-

CROUSE v. FLOWERS BAKING CO.

[123 N.C. App. 555 (1996)]

manent partial compensation. The Full Commission affirmed this award. Plaintiff appeals.

Without reaching the merits of plaintiff's appeal, we conclude that it must be dismissed for failure to supply an adequate record. Rule 18(c)(3) requires that in appeals from an agency, such as the Industrial Commission, the record must contain: "Copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination." N.C.R. App. P. 18(c)(3) (1996). Rule 18(c)(7) requires "[c]opies of all other papers filed . . . which are necessary to an understanding of all errors assigned" unless they appear in the transcript. N.C.R. App. P. 18(c)(7) (1996). Workers' Compensation Rule 501 requires that all agreements for compensation be filed with the Commission for approval on forms prescribed by the Commission. Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 501(4) (1996).

Although both parties stipulated that defendant made temporary total disability payments to the plaintiff from 18 May 1989 until 27 July 1990, there is no Form 21 in the record. Neither the Opinion and Award, nor the transcript mention its existence. However, defendants' response to plaintiff's request for hearing indicates that a Form 21 was approved by the Commission on 21 December 1989. If such an agreement was approved, we are left to speculate as to its terms. Without it we are unable to determine whether defendant agreed to pay for a specified term or whether it agreed to pay "during disability," thereby invoking the presumption that disability continues until plaintiff returns to work. *See Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971); *see also* Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 404(1) (1996). Therefore, we are unable to review the Commission's decision because we cannot determine which standard the Commission was to apply.

Since a Form 21, which indicates an agreement for compensation, is required to be filed with the Commission and "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete," *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983), we hold that the absence of a Form 21 from the record subjects this appeal to dismissal under Rule 18.

Appeal dismissed.

Judges GREENE and SMITH concur.

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

PAMELA SUE MACLAGAN, APPELLANT/CROSS-APPELLEE v. MAURY D. KLEIN,
APPELLEE/CROSS-APPELLANT

No. COA95-732

(Filed 20 August 1996)

1. Divorce and Separation § 359 (NCI4th)— modification of custody—unfitness of custodial parent not required

It is not required that the person having custody under a previous order be found unfit or no longer able or suited to retain custody in order to modify the order so long as a substantial change in circumstances affecting the welfare of the child is found.

Am Jur 2d, Divorce and Separation § 1014.**2. Divorce and Separation § 372 (NCI4th)— child custody—substantial change in circumstances—sufficiency of evidence**

Plaintiff's claim that there was no showing of a substantial change in circumstances affecting the health and welfare of the parties' child was without merit where there was evidence to support the trial court's findings that the child experienced anxiety and stress due to remarks made to her about her being a Jew by one or more children in the town where her mother moved; the child experienced stress and anxiety as a result of her exposure to two competing religions; plaintiff failed on occasion to cooperate and facilitate telephone communication between defendant and the child; the child suffered symptoms of physical illness possibly caused by stress related to her parents' conflict; plaintiff involved the child in the conflict between the parties; and, in the opinion of her therapist, the child was in need of therapy due to the stress and anxiety she was experiencing.

Am Jur 2d, Divorce and Separation §§ 1010, 1011.**Religion as factor in child custody and visitation cases.
22 ALR4th 971.****3. Divorce and Separation § 372 (NCI4th)— defendant's positive relationship with child—plaintiff's move—change in circumstances—finding based on other factors**

There was no merit to plaintiff's contention that the court erred by admitting into evidence and basing its finding of a sub-

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

stantial change of circumstances upon evidence concerning plaintiff's move from Chapel Hill to Edenton, since plaintiff's move was not the basis for the court's determination that there had been a change in circumstances, and the court's findings with respect to changes which occurred since the move to Edenton were based on competent evidence and were sufficient to support the court's conclusion of a substantial change in circumstances.

Am Jur 2d, Divorce and Separation § 1010.**4. Divorce and Separation § 340 (NCI4th)— defendant in charge of child's religious training—sufficiency of findings**

The trial court did not abuse its discretion in granting defendant father charge of the minor child's religious training and practice and requiring plaintiff's cooperation with respect thereto where the court found that the parties had agreed to rear their child in the Jewish faith; she had had a positive sense of identity as a Jew since she was three years old and had had substantial involvement with a synagogue in Durham; since her introduction into activities at the Methodist church in Edenton by plaintiff mother, she had experienced stress and anxiety as a result of her exposure to two conflicting religions; and the court's order revealed no impermissible expression of preference by the trial court for one religion over another.

Am Jur 2d, Divorce and Separation § 1011.**Religion as factor in child custody and visitation cases. 22 ALR4th 971.****5. Evidence and Witnesses § 785 (NCI4th)— evidence excluded—similar evidence before court—document mistakenly offered into evidence and withdrawn—cross-examination not allowed**

Defendant was not prejudiced by the exclusion of examination of a minor child's therapist with respect to a conference in which plaintiff allegedly made statements regarding her motives in moving away from Chapel Hill, since evidence of similar import was before the court; nor was defendant prejudiced by the trial court's denial of his request to be permitted to recross-examine plaintiff about a document which she had offered into evidence but later withdrew before the document had been admitted, since it was apparent that the document had been offered into evidence

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

by mistake and had been withdrawn when the mistake was discovered.

Am Jur 2d, Appellate Review § 759.**6. Divorce and Separation § 372 (NCI4th)— plaintiff as fit parent—no specific finding made—sufficiency of findings to support conclusion**

The trial court made amply sufficient findings to support its conclusion that circumstances had substantially changed since the previous custody order which affected the health and welfare of the child so that a modification of the prior order would be in her best interests, and, although the court made no specific finding as to plaintiff's fitness, it had found plaintiff to be a fit and proper person to have custody in two prior custody orders and made no finding in the present order that plaintiff was no longer a fit person to have custody; therefore, the court's findings were sufficient to support its conclusion that the child's best interests would be served by awarding joint custody to plaintiff and defendant.

Am Jur 2d, Divorce and Separation § 1011.

Appeal from order entered 8 December 1994 by Judge Lowry Betts in Orange County District Court. Heard in the Court of Appeals 19 March 1996.

Donna Ambler Davis, P.C., by Donna Ambler Davis, for plaintiff-appellant/cross-appellee.

Northen, Blue, Rooks, Thibaut, Anderson & Woods, L.L.P., by Charles T.L. Anderson and Carol J. Holcomb, for defendant-appellee/cross-appellant.

MARTIN, John C., Judge.

Plaintiff-mother and defendant-father appeal from an order awarding them joint custody of their minor child, Ashley Danien Klein, who was born on 29 June 1988. The parties have never been married to each other, but cohabitated for over two years, and defendant has legitimated the child. The relevant portions of the protracted and acrimonious procedural history of the case are summarized below.

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

On 11 May 1992, after a custody evaluation was completed by a Dr. John Looney, Director of the Division of Child and Adolescent Psychiatry at Duke University, the trial court entered a consent order in which it found and concluded, *inter alia*, that both parents are fit and proper persons to have custody of the minor child, but that it was in Ashley's best interest for plaintiff-mother to have custody. The court then: (1) awarded custody to plaintiff; (2) ordered that plaintiff consult with defendant with respect to all major decisions involving the child's education and health reasonably in advance of such decisions, and if the parties could not reach an agreement, they were to seek the advice of the child's therapist, Dr. Barbara Hawk, who would attempt to facilitate an agreement; and (3) provided for a visitation schedule for defendant with Ashley including approximately five days out of every two weeks, periods of summer and other visitation, and Jewish holidays. Defendant, who is Jewish, and plaintiff, who is not Jewish, had agreed prior to Ashley's birth that their child would be reared in the Jewish faith.

After the consent order was issued, plaintiff unilaterally terminated Ashley's therapy with Dr. Hawk, stating in a letter dated 17 July 1992 that she felt it best for all concerned, and especially for Ashley, that the child see another therapist. On 3 August 1992, defendant filed a motion seeking, *inter alia*, that he be awarded custody of Ashley due to a substantial change in circumstances adversely affecting the child. The specific grounds alleged by defendant were plaintiff's: termination of Ashley's therapy with Dr. Hawk; announced intention to relocate to impair defendant's visitation with Ashley; refusal to cooperate with defendant in parenting and particularly in raising Ashley in the Jewish faith; and inability to separate her personal conflicts with defendant from the exercise of judgment as to Ashley's best interests.

While defendant's motion was pending, plaintiff took a job as a teacher in the Bertie County School System and relocated with the child from Chapel Hill, North Carolina to Edenton, North Carolina. By letter sent 23 August 1992, plaintiff advised defendant that she and Ashley were relocating, and that defendant's pick-up for visitation should be exercised in Edenton, North Carolina. Plaintiff moved, with Ashley, to Edenton on the following day, 24 August 1992. Plaintiff subsequently testified that her relationship with defendant had no bearing on where she searched for a job, and that she would have been happy to have been able to acquire a job that did not require her and Ashley to relocate. After August 1992, defendant drove to and from Edenton each week to exercise his visitation with Ashley.

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

At a hearing on defendant's motion for change of custody, Dr. Looney testified that, in his opinion, plaintiff's behavior since the court's 11 May 1992 consent order demonstrated her inability to separate her conflict with defendant from what is in the best interest of the child, and that Ashley's interest would now best be served by defendant having custody. However, on 5 March 1993, the trial court found and concluded that plaintiff's move to Edenton was done in good faith for economic reasons and not for the purpose of thwarting or interfering with defendant's visitation with Ashley or Ashley's religious training, that Ashley's best interests were served by plaintiff retaining custody, but that the move to Edenton constituted a sufficient change in circumstances to modify the visitation schedule. The trial court denied defendant's motion for change of custody, but modified the previous order with respect to visitation.

On 27 May 1993, plaintiff filed a motion to amend the visitation schedule, alleging that the current schedule interrupted Ashley's kindergarten attendance. In response, defendant asserted that he had, based upon the recommendation of Ashley's therapist, made arrangements to rent a residence in Edenton so that the existing visitation schedule would not interrupt Ashley's school schedule or attendance. Defendant also alleged that plaintiff had failed and refused to consult with him regarding Ashley's school enrollment and was in violation of the prior consent order. He also contended that by enrolling Ashley in a "year round" school, plaintiff had jeopardized defendant's planned period of summer visitation.

By order dated 24 August 1993, the trial court concluded that plaintiff had not carried her burden of proving that Ashley's attendance of kindergarten from both her mother's home and her father's leased residence in Edenton, and visits with her father to Chapel Hill, would adversely affect her. The court made a minor modification as to the time and place of visitation exchanges, and ordered the parties to meet with Paula Browder, Ashley's therapist, to monitor their conflict and develop co-parenting skills.

Between the fall of 1992 and summer of 1993, Ashley occasionally attended a Methodist church in Edenton with her grandmother and sometimes with her mother. Subsequent to the summer of 1993, Ashley's participation in events at the church increased and included regular attendance of Sunday School, a weekly fellowship/choir program, and Vacation Bible School in the early summer of 1994.

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

On 5 May 1994, defendant filed another motion in the cause alleging a substantial change in circumstances and requesting a modification of the trial court's prior custody award. Defendant based his motion on the following grounds: plaintiff's initiation of active religious worship with Ashley at a Christian church and the resulting conflict in Ashley's mind about her personal and religious identity; Ashley being teased as "a Jew" at her school and the lack of other Jewish children or a Jewish community in Edenton; a conflict between Ashley's school attendance in Edenton and the celebration of Jewish holidays with her synagogue in Durham; and plaintiff's failure to act so as to reduce the difficulty and stress related to Ashley's visitation with defendant and transfers between plaintiff and defendant.

At hearings on the motion conducted in July and August 1994, the evidence included testimony by Paula Browder that Ashley was suffering from increased anxiety, confusion, and stress over the past year due to travel between two households, her parents' inability to communicate with each other, and from having to operate in two unrelated worlds and communities. Ms. Browder further testified that, in her opinion, the increased stress was the cause of headaches and stomachaches of which Ashley had complained, and that plaintiff's incorporation of Ashley into church activities was creating confusion as to Ashley's self-concept and self-identity. Ms. Browder stated that Ashley had talked about worries about pleasing both parents each of whom wanted her to be of their own religious faith, and that Ashley expressed a need to be loyal to both and be Jewish when she was with her father and Christian when she was with her mother. Ms. Browder also stated that Ashley had told her at different times that she wished she could build a synagogue for her father and a church for her mother. Ms. Browder further testified that it was her observation that plaintiff has a pattern of obstructing Ashley's relationship with defendant, that she felt plaintiff was undermining Ashley's training in Judaism, that plaintiff was often unilaterally making decisions for Ashley rather than co-parenting with defendant, and that, because of a lack of co-parenting, defendant does not cooperate when activities about which he was not consulted are planned for Ashley during his visitation time with her. As a result, Ashley feels that her father does not support her activities and is not interested in what she wants to do.

In addition, Ms. Browder stated that defendant "may be pushing Ashley too hard about remembering she's Jewish now that

MacLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

Christianity has been introduced,” and that it would be best for Ashley if she were raised in one faith. As to Ashley being “teased” by other children about being Jewish, Ms. Browder stated that Ashley had mentioned this in therapy sessions, that plaintiff had stated that she knew of only one incident when this occurred, and that plaintiff was not happy about the incident and had checked into it. Ms. Browder also interpreted a tape of a telephone conversation between Ashley and defendant and expressed her opinion that plaintiff had interfered with and distracted Ashley from talking to her father by carrying on a one-sided conversation with Ashley while she was on the phone. She further stated that, in her opinion, Ashley was put in an awkward position of having to relay messages between her parents because plaintiff refused to get on the phone when defendant asked to speak to plaintiff, and that Ashley feels her parents cannot directly communicate with each other. The court also heard testimony from defendant that he experienced interference or a lack of cooperation from plaintiff on about half of the occasions when he spoke with Ashley on the telephone due to noise, interruptions, etc.

Ms. Browder further testified that Ashley has a good relationship with both parents, and that, in her opinion, apart from consideration of religious aspects or either party’s relocation, Ashley’s best interests would be served by residing in one community in close proximity to both parents, and that she should spend an equal amount of time with both parents. When asked specifically for her opinion of who would be the better parent to have custody of Ashley, Ms. Browder expressed a preference that Ashley’s custody not be placed solely with one parent, but felt that, if custody were to be granted to one parent, defendant would be the better parent to have custody.

The court also heard from Dr. Beth Kurtz-Costes, an assistant professor of psychology at the University of North Carolina at Chapel Hill conducting research examining parental influences on children’s development. Dr. Kurtz-Costes testified that she had been asked to view a videotape of an interaction between a mother and her child and to give her opinions of the videotape. Dr. Kurtz-Costes further stated that she had not been told which party requested her to view the tape. The videotape, made by an acquaintance of plaintiff, depicted an occasion when defendant came to pick Ashley up after Ashley had earlier in the week been diagnosed and treated for chicken pox. Plaintiff stated that she had requested her acquaintance to make the videotape so there would be no question that she was in compliance with the trial court’s order, and to show that she was “try-

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

ing to make the transition best for Ashley.” Dr. Kurtz-Costes testified that, though there were some interchanges that were very appropriate, she was of the opinion that plaintiff’s conduct contributed to Ashley’s stress by sending strong messages or cues conveying negative sentiments about Ashley leaving with her father, that plaintiff was powerless to prevent Ashley from leaving due to the court order, and that plaintiff was “creating a situation for her daughter of it’s you and me against them.”

On 8 December 1994, the trial court entered an order concluding as a matter of law that there had been a substantial change in circumstances affecting the health and welfare of the minor child, and that it was in Ashley’s best interest that the prior custody order be modified. The court based its conclusions of law on findings of fact including: that Ashley complained of stomachaches in November and December 1993 for which no physiological cause was identified, and which her physician described as “possibly stress related due to the transition between parents who are not on good terms with each other”; that the parties agreed, as admitted by plaintiff, to rear Ashley in the Jewish faith; that Ashley has had substantial involvement with the Judea Reform Congregation Synagogue in Durham and the Durham-Chapel Hill Jewish community since birth, and the self-concept she derives from this association is vital to her mental well being; that Ashley is experiencing stress and anxiety due to her exposure to two conflicting religions, and this is having a detrimental effect on her emotional well being and her relationship with the Jewish religious community in Chapel Hill; that there is evidence that one or more children in Edenton have made remarks to Ashley about her Jewishness, causing Ashley to experience anxiety and stress; that plaintiff has not attended counselling sessions with Paula Browder as agreed and ordered in the court’s 24 August 1993 order, and has expressed a reluctance to schedule or continue such sessions; that defendant has regularly and consistently taken Ashley to see Paula Browder and has himself met individually with Ms. Browder to enhance his parenting and his relationship with Ashley; that plaintiff has involved Ashley in the parties’ conflict and suggested to Ashley that she become an advocate for plaintiff’s position; that plaintiff has, on occasion, failed to cooperate with and facilitate telephone communication between Ashley and defendant, and has involved Ashley in the conflict by communicating to defendant through Ashley; that Ashley has had a positive sense of identity as a Jew since she was three years of age and interference with her worship as a Jew and fel-

MacLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

lowship with other Jews will adversely impact her emotional well-being; that Ashley's circumstances have so changed that her welfare has been and will be adversely affected unless custody is modified; that defendant is a fit and proper person to have shared custody of Ashley; and that it is in Ashley's best interest that she be placed in the joint custody of plaintiff and defendant subject to certain terms and conditions.

The trial court awarded custody of Ashley to plaintiff and defendant, and ordered, *inter alia*: that Ashley continue her enrollment in the Edenton public schools until otherwise ordered by the court; that Ashley reside alternately with each parent and be exchanged according to a monthly calendar devised by the court; that plaintiff be in charge of Ashley's social activities such as swim, dance and/or gymnastic lessons, but that no such activities shall be scheduled on days when defendant and Ashley are in Chapel Hill, unless defendant agrees; that defendant be in charge of Ashley's religious training and practice, and that plaintiff cooperate in and abide by defendant's directives regarding religious training and practice; and that Ashley continue in therapy with Paula Browder until otherwise ordered by the court. Both plaintiff and defendant appeal.

Plaintiff's Appeal

A motion to modify a court's prior award of custody of a minor child cannot be granted "until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Ramírez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992) (citations omitted). Any such modification must be supported by findings of fact based on competent evidence "that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified." *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E.2d 140, 144 (1969). "[T]he party moving for such modification has the burden of showing such change of circumstances." *Tucker v. Tucker*, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975). "However, there is no burden of proof on either party on the 'best interest' question." *Ramírez-Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679.

A trial judge "who has the unique opportunity of seeing and hearing the parties, witnesses and evidence at trial, is vested with broad discretion in cases concerning the custody of children." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). Moreover, a trial court's

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

“findings of fact are conclusive on appeal if there is any competent evidence to support them, even though the evidence might sustain findings to the contrary, and even though some incompetent evidence may also have been admitted.” *Pritchard v. Pritchard*, 45 N.C. App. 189, 196, 262 S.E.2d 836, 840 (1980).

In this case, the trial court made numerous findings of fact as to circumstances affecting the welfare of the minor child, including the finding that her circumstances “have so changed that her welfare has been and will be adversely affected unless the custody provision is modified.” By the first question presented in plaintiff-appellant’s brief, in support of which she lists thirty-two separate assignments of error, plaintiff attacks certain of the court’s findings as not reflective of a substantial change in circumstances. She argues that the trial court erred in concluding there was a substantial change in circumstances directly affecting the health and welfare of the minor child so as to warrant a modification of the prior custody order. We disagree.

[1] Plaintiff first argues that defendant’s positive relationship with Ashley is not a substantial change in circumstances absent evidence and a finding that plaintiff’s fitness as a custodial parent has changed. This argument is sophistic. First, we note that to modify a prior custody order, it is not required that the person having custody under the previous order be found unfit or no longer able or suited to retain custody so long as a substantial change in circumstances affecting the welfare of the child is found. *See* 10 Strong’s N.C. Index 4th *Divorce and Separation* § 359 (1991). Moreover, the court’s findings with respect to defendant’s relationship with Ashley do not appear to us to have been the basis for its conclusion that there had been a substantial change in circumstances affecting her welfare.

[2] Plaintiff also asserts that there is insufficient evidence to support the trial court’s findings: that Ashley has experienced anxiety and stress due to remarks made to her about her Jewishness by one or more children in Edenton; that Ashley has experienced stress and anxiety as a result of her exposure to two competing religions; and that plaintiff has failed on occasion to cooperate and facilitate telephone communication between defendant and Ashley. Plaintiff further contends that such findings are insufficient to constitute a substantial change in circumstances.

Our examination of the record reveals competent evidence to support these findings of the trial court and the court’s conclusion that there has been a substantial change in circumstances affecting

MacLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

the welfare of the minor child. In addition to the findings contested above, the record contains additional evidence tending to show a change in circumstances, including: that Ashley has suffered symptoms of physical illness possibly caused by stress related to her parents' conflict; that plaintiff has involved Ashley in the conflict between the parties; and that, in the opinion of her therapist, Ashley is in need of therapy due to the stress and anxiety she is experiencing. In sum, we find plaintiff's claim that there was no showing of a substantial change in circumstances affecting Ashley's health and welfare to be without merit.

[3] Plaintiff next contends that the trial court erred by admitting into evidence and basing its finding of a substantial change of circumstances upon evidence concerning plaintiff's move to Edenton. Initially, we note from our review of the trial court's order, no findings which would relate plaintiff's move to Edenton to its legal conclusion that a substantial change in circumstances has occurred since the previous custody order. The court's findings of fact with respect to changes which have occurred *since* the move to Edenton, however, are based on competent evidence in the record and are conclusive "even though there is evidence to the contrary, or even though some incompetent evidence may have been admitted." *In re McCraw Children*, 3 N.C. App. 390, 392, 165 S.E.2d 1, 3 (1969). Such findings support the court's conclusion of a substantial change in circumstances. Accordingly, we find this argument of plaintiff to be without merit.

Plaintiff has referred to numerous other assignments of error following the first question stated in her brief; however, we are unable to ascertain that any reason or argument has been stated, or authority cited, in support of those assignments of error. Accordingly, pursuant to N.C.R. App. P. 28, we deem these remaining assignments of error to be abandoned. Nevertheless, we have examined all of the court's findings of fact identified in the assignments of error listed under plaintiff's first argument and find competent evidence in the record to support each of them. The court's findings, in turn, support its conclusions of law. Plaintiff's first argument is overruled.

[4] In plaintiff's second argument, she asserts that, assuming *arguendo* there was a substantial change of circumstances allowing a modification of the custody order, the trial court abused its discretion in ordering that defendant be in charge of the child's religious training because, in so doing, the court "erroneously involved itself in the

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

religious decisions of the parties" in violation of the Establishment Clause of the First Amendment and plaintiff's free expression of her religious beliefs. We reject her argument.

"Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child." *Phelps v. Phelps*, 337 N.C. 344, 352, 446 S.E.2d 17, 22, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 750 (1994). "The trial judge's decision shall not be upset on appeal absent a clear showing of abuse of discretion." *Benedict v. Coe*, 117 N.C. App. 369, 376, 451 S.E.2d 320, 324 (1994) (citation omitted). Moreover, the factors examined by the court "may include the consideration of constitutionally protected choices or activities of parents." *Phelps*, 337 N.C. at 352, 446 S.E.2d at 22. Specifically as to the consideration of religion in child custody cases, this Court has previously stated that "although a court may consider a child's spiritual welfare as part of the best interests determination, a court may not base its findings on its preference for any religion or particular faith." *Petersen v. Rogers*, 111 N.C. App. 712, 718, 433 S.E.2d 770, 774 (1993), *reversed on other grounds*, 337 N.C. 397, 445 S.E.2d 901 (1994). The general rule is that "a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child." *Id.* at 719, 433 S.E.2d at 775.

Plaintiff contends the trial court abused its discretion by granting defendant sole decision-making power as to the child's religious training because, in so doing, the court allegedly stated "an explicit preference for the father's Jewish faith as opposed to the mother's Christian religion." Plaintiff also refers us to cases from other jurisdictions for the proposition that courts must maintain impartiality regarding religious beliefs in child custody cases. *See, e.g., Ex parte Hilley*, 405 So. 2d 708 (Ala. 1981); *Compton v. Gilmore*, 560 P.2d 861 (Idaho 1977); *Kirchner v. Caughey*, 606 A.2d 257 (Md. 1992); *Fisher v. Fisher*, 324 N.W.2d 582 (Mich. Ct. App. 1982); *Munoz v. Munoz*, 489 P.2d 1133 (Wash. 1971). However, these cases also illustrate that factual and legal circumstances can justify custodial restrictions upon religious activities in certain cases. As the *Munoz* court stated:

Thus, the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from tak-

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

ing the children to a particular church, *except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.*

Munoz, 489 P.2d at 1135 (emphasis added). See also *Kirchner v. Caughey*, 606 A.2d at 577 (holding that the “clear and affirmative showing” referred to in *Munoz* requires a factual finding of a causal relationship between the religious practices and the actual or probable harm to the child). The trial court in *Munoz* had awarded custody of the parties’ children and sole control over the children’s religious training to the mother, who was a Mormon, and specifically prohibited the father, who was Catholic, from taking his children to any Catholic services while the children were visiting him. The Supreme Court of Washington subsequently struck the trial court’s order because it found no affirmative showing that the children were emotionally upset or emotionally disturbed by attending two churches, or that exposure to two religious beliefs had, or would have, any adverse effect on the children. *Munoz*, 489 P.2d at 1135-36.

The present case, however, presents a different situation. Here, the trial court found: the parties had agreed to rear the minor child in the Jewish faith; the child has had a positive sense of identity as a Jew since she was three years old and has had substantial involvement with the Judea Reform Congregation Synagogue in Durham; and since her introduction into activities at the Edenton United Methodist Church, the child has experienced stress and anxiety as a result of her exposure to two conflicting religions which have had a detrimental effect on her emotional well-being. These findings are supported by the evidence and demonstrate affirmatively a causal connection between the conflicting religious beliefs and a detrimental effect on the child’s general welfare. Accordingly, the findings support the trial court’s order granting defendant charge of Ashley’s religious training and practice and requiring plaintiff’s cooperation with respect thereto.

In addition, contrary to plaintiff’s claim, we discern no impermissible expression of preference for one religion over another on the part of the trial court. The court’s findings make it clear that its order giving defendant charge of the child’s religious training is not based on a preference for Judaism, but rather arises from the fact that the child has had a positive Jewish self-identity since she was three years of age, and the fact that the parties had an undisputed agreement “to raise Ashley Danien Klein in accordance with the tenents [sic] of

MACLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

Defendant's Jewish faith and heritage." We also reject plaintiff's claim that the order infringes upon her "constitutional right to the free expression of her religious beliefs." The trial court's order contains nothing which would prohibit plaintiff from following and/or engaging in the beliefs and practices of her chosen religion. The court properly limited its inquiry, and its order, to the detrimental impact of conflicting religions on the health and welfare of the child. Plaintiff's assignments of error are overruled.

Defendant's Appeal

[5] Defendant's first contention in his cross-appeal is that the trial court erred in excluding examination of Paula Browder, Ashley's therapist, with respect to a conference, on 2 June 1993, attended by plaintiff, plaintiff's counsel, plaintiff's psychologist, and Browder in which plaintiff allegedly made statements regarding her motives in moving away from Chapel Hill. At the hearing, plaintiff objected to the inquiry on the grounds that the statements were privileged. Defendant argues on cross-appeal that plaintiff's statements were not privileged and that the evidence was relevant to establish plaintiff's misrepresentation as to her real motivation for relocating from Chapel Hill to Edenton, which was to thwart defendant's contact with the minor child; to counter plaintiff's impeachment of Browder regarding Browder's testimony of other statements allegedly made by plaintiff that her relocation was to distance herself and the child away from defendant; and to counter plaintiff's assertion of surprise by this issue. Defendant made no formal offer of proof, but contends the substance of the evidence was apparent from the context within which the questions were asked. *See* N.C. Gen. Stat. § 8C-1, Rule 103 (a)(2).

Although the court excluded Ms. Browder's testimony as to the 2 June 1993 conference, it allowed her to testify as to other statements that plaintiff allegedly had given as a reason for relocating including, "slowing down the travel and the amount of visitation that was going on for Ashley," and laughing about how far she could get away from defendant. Thus, evidence of similar import was before the court and any error by the trial court in excluding Ms. Browder's testimony about plaintiff's statements at the 2 June 1993 conference was harmless. *See, e.g., Medford v. Davis*, 62 N.C. App. 308, 311, 302 S.E.2d 838, 840, *disc. review denied*, 309 N.C. 461, 307 S.E.2d 365 (1983) ("Error in the exclusion of evidence is harmless when other evidence of the same import is admitted."). Assuming, *arguendo*, the exclusion of Ms. Browder's testimony with respect to the 2 June 1993 conference was

MacLAGAN v. KLEIN

[123 N.C. App. 557 (1996)]

error, defendant has not shown prejudice and this assignment of error is overruled.

Defendant next assigns error to the trial court's denial of his request to be permitted to recross-examine plaintiff about a document which she had offered into evidence, but later withdrew before the document had been admitted. "The scope of cross-examination rests largely in the discretion of the trial court, and its rulings will not be disturbed absent a clear showing of abuse or prejudice." *State v. Moorman*, 82 N.C. App. 594, 600, 347 S.E.2d 857, 860 (1986), *reversed on other grounds*, 320 N.C. 387, 358 S.E.2d 502 (1987) (citing *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982)). Moreover, "after a witness has been cross-examined and reexamined, unless the redirect examination includes new matter, it is in the discretion of the judge to permit or refuse a second cross-examination . . ." *Id.* From the context in which it was offered, it is apparent that the document, a letter to plaintiff from her former counsel, had been offered into evidence by mistake and had been withdrawn when the mistake was discovered. Thus, under the circumstances, we discern neither an abuse of discretion by the trial judge nor any prejudice to the defendant. Defendant's contention to the contrary is overruled.

[6] In his final argument, defendant claims the trial court erred by failing to make specific findings of fact as to issues which he contends were determinative of the controversy and thus were "ultimate facts" essential to support the court's conclusions and award of joint custody. Specifically, he argues that he presented substantial evidence which required the court to determine: whether plaintiff's pattern of behavior was intended to, and in fact did, alienate the minor child's affections from defendant; whether plaintiff had misrepresented facts in her testimony before the trial court; and whether plaintiff was a fit and proper person to have custody of the minor child. We find no merit in his argument.

"An order awarding joint custody or any other child custody award must include findings of fact that support a determination of the child's best interest." *Church v. Church*, 119 N.C. App. 436, 438, 458 S.E.2d 732, 733 (1995). "However, the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990), *affirmed*, 328 N.C. 324, 401 S.E.2d 362 (1991). "This

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

is a discretionary matter with the court which can only be disturbed upon 'a clear showing of abuse of discretion.' " *Id.* (quoting *Dixon v. Dixon*, 67 N.C. App. 73, 76, 312 S.E.2d 669, 672 (1984)).

We hold that the trial court made amply sufficient findings to support its conclusion that circumstances had substantially changed since the previous custody order, which affected the health and welfare of the child, so that a modification of the prior order would be in her best interests. Although the court made no specific finding as to the plaintiff's fitness, it had found plaintiff to be a fit and proper person to have custody of the minor child in two prior custody orders and made no finding in the present order that plaintiff is no longer a fit person to have custody. Accordingly, we hold the court's findings sufficient to support its conclusion that the child's best interests will be served by awarding joint custody to plaintiff and defendant, and defendant's assignments of error are overruled.

The trial court's order awarding plaintiff and defendant joint custody of their minor child, according to the terms and conditions stated therein, is in all respects affirmed.

Plaintiff's appeal—Affirmed.

Defendant's appeal—Affirmed.

Judges JOHNSON and McGEE concur.

SUZANNE HYDE AND LYNN MEEKS, PLAINTIFFS-APPELLANTS v. ABBOTT LABORATORIES, INC., BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,
DEFENDANTS-APPELLEES

No. COA95-1147

(Filed 20 August 1996)

Monopolies and Restraints of Trade § 27 (NCI4th)— indirect purchasers—standing to sue under state antitrust laws

By enacting the 1969 revisions to N.C.G.S. § 75-16, the General Assembly clearly intended to expand the class of persons with standing to sue for a violation of North Carolina's antitrust laws, N.C.G.S. § 75-1 *et seq.*, to include any person who suffers an

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

injury under Chapter 75, regardless of whether that person purchased directly from the wrongdoer; therefore, the trial court erred in dismissing plaintiffs' claim alleging that defendants engaged in a conspiracy to fix the wholesale price of infant formula on the ground that plaintiffs, as indirect purchasers, lacked standing to bring this action under N.C.G.S. § 75-16.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 417-419.

Right of retail buyer of price-fixed product to sue manufacturer on federal antitrust claim. 55 ALR Fed. 919.

Appeal by plaintiffs from order entered 27 July 1995 by Judge Janet Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 23 May 1996.

Hunter & Large, P.L.L.C., by Raymond D. Large, Jr. and Diane E. Sherrill, and Heins Mills & Olson, P.L.C., by Kent M. Williams for plaintiffs-appellants.

Smith Helms Mullis & Moore, L.L.P., by Larry B. Sitton, James G. Exum, Jr. and Richard A. Coughlin for defendants-appellees Bristol-Myers Squibb Company, and Mead Johnson & Company.

Peetree Stockton, L.L.P., by John T. Allred for defendant-appellant Abbott Laboratories, Inc.

WYNN, Judge.

In November of 1994, plaintiffs Suzanne Hyde and Lynn Meeks filed a class action lawsuit on behalf of themselves and others similarly situated (hereinafter plaintiffs), seeking damages from defendants for alleged violations of North Carolina's antitrust laws—N.C. Gen. Stat. § 75-1 *et. seq.* (1994).

Plaintiffs alleged that between 1980 and 1992, defendants violated several of the antitrust laws of this state by "engaging in a continuing conspiracy to fix the wholesale price of infant formula sold within the United States, including North Carolina." Plaintiffs further alleged that the above illegal conspiracy caused an increase in wholesale prices paid by the parties who purchased the infant formula directly from the manufacturer (hereinafter direct purchasers) above that which the direct purchasers would have paid absent any conspiracy.

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

Plaintiffs, who are North Carolina residents, are indirect purchasers from the defendant manufacturers because they purchased infant formula through parties other than the manufacturer. Plaintiffs contended that they paid higher prices than they would have paid but for the alleged illegal conduct.

In February of 1995, defendants moved to dismiss plaintiffs' complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), alleging that plaintiffs, as indirect purchasers, lacked standing to bring this action under N.C.G.S. § 75-16. In an amended order filed 27 July 1995, Superior Court Judge Janet Marlene Hyatt agreed, and granted defendants' motion to dismiss. From this order, plaintiffs appealed.

Prior to oral arguments before this Court, plaintiffs and defendant Abbott Laboratories entered into a tentative settlement agreement which must be approved by the superior court under N.C.R. Civ. P. Rule 23(c) (1996). As a result, plaintiffs and defendant Abbott Laboratories jointly moved for dismissal of the appeal against Abbott Laboratories. We granted that motion. Accordingly, this appeal proceeds against the remaining defendants, Bristol-Myers Squibb and Mead Johnson (hereinafter defendants).

As an initial matter, we note that the record on appeal does not clearly indicate whether the proposed record on appeal was served on 7 September 1995 or 11 October 1995. If service was accomplished on the later date, the proposed record was not timely served and the appeal is subject to dismissal. *Brooks v. Jones*, 121 N.C. App. 529, 530, 466 S.E.2d 344, 345 (1996); *Wilson v. Bellamy*, 105 N.C. App. 446, 457, 414 S.E.2d 347, 353, *disc. review denied*, 331 N.C. 558, 418 S.E.2d 668 (1992). The burden is on an appellant to establish that a record on appeal has been timely filed as required by the appellate rules. However, because there is a discrepancy in the record as to the date of service and given the great public importance of the issues in this case, we elect to treat the earlier date as the correct date of service. N.C.R. App. P. 2 (1996); *Wilson*, 105 N.C. App. at 457, 414 S.E.2d at 353.

On appeal, plaintiffs contend that the trial court erred by dismissing their complaint under N.C.R. Civ. P. 12(b)(6) on the grounds that indirect purchasers lack standing under N.C.G.S. § 75-16. We agree, and therefore reverse the order of the trial court.

A Rule 12(b)(6) motion to dismiss presents the question "whether, as a matter of law, the allegations of the complaint, . . . are

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

sufficient to state a claim upon which relief may be granted” *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling on the motion to dismiss, the allegations of the complaint must be treated as true. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). In ruling upon a Rule 12(b)(6) motion, the complaint is to be liberally construed, and should not be dismissed “unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Davis v. Messer*, 119 N.C. App. 44, 51, 457 S.E.2d 902, 906-07, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995).

N.C.G.S. § 75-16 governs the determination of standing for redress of Chapter 75 violations. *Cf. La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 485, 350 S.E.2d 889, 892 (1986), *cert. denied and appeal dismissed*, 319 N.C. 459, 354 S.E.2d 888 (1987). That section provides:

75-16. Civil action by person injured; treble damages.

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Section 75-16 is similar to section 4 of the federal Clayton Act. *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981).

Section 4 of the Clayton Act states:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1991).

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, *reh'g denied*, 434 U.S. 881, 54 L. Ed. 2d 164 (1977), the United States Supreme Court held that indirect purchasers, such as plaintiffs in the

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

instant case, are not injured in their business within the meaning of section 4 of the Clayton Act, and thus, with certain exceptions, lack standing to pursue a claim under the federal antitrust laws. *Id.* at 728-29, 52 L. Ed. 2d at 714. The Court found this holding to be required by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 20 L. Ed. 2d 1231 (1968).

Illinois Brick held that direct purchasers suffer the entire injury which follows from a violation of the federal antitrust laws, and are the only private parties allowed to sue for federal antitrust violations. *Illinois Brick*, 431 U.S. at 728-29, 52 L. Ed. 2d at 714. Consequently, the plaintiffs in the instant case could not pursue their claim under the federal antitrust laws unless they could demonstrate that their facts fit within an exception to *Illinois Brick*. Plaintiffs conceded this point at oral argument.

However, in *California v. Arc America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86 (1989), the United States Supreme Court held that a state may, consistent with the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2, allow an indirect purchaser to sue under the state's own antitrust laws. *Id.* at 105-06, 104 L. Ed. 2d at 97. The issue in this case is whether N.C.G.S. § 75-16 allows such a suit by an indirect purchaser. We hold that it does.

In construing a statute, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Legislative purpose is first ascertained from the plain words of the statute." *Id.* "Our task is to determine whether the intent of the Legislature will be more fully served [if we construe this section in the manner argued by plaintiffs]." *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400.

Plaintiffs contend that by enacting N.C.G.S. § 75-16 the legislature intended to grant standing to a consumer purchasing indirectly from a manufacturer or service provider to sue that manufacturer or service provider for a violation of Chapter 75, and that we should interpret this section to allow an indirect purchaser standing to sue for such violations.

Prior to a 1969 revision, N.C.G.S. § 75-16 began: "*If the business of any person, firm or corporation shall be broken up, destroyed or injured . . .*" (emphasis supplied). In 1969, the General Assembly amended this section. The first sentence now begins:

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing . . . in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action . . .

(emphasis supplied). “Changes made by the legislature to statutory structure and language are indicative of a change in legislative intent and therefore provide some weight in our analysis.” *Electric Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 295.

In enacting the 1969 revisions, the General Assembly intended to “enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer.” *Hardy v. Toler*, 24 N.C. App. 625, 630-31, 211 S.E.2d 809, 813, *modified on other grounds*, 288 N.C. 303, 218 S.E.2d 342 (1975); *see also Marshall*, 302 N.C. at 543, 276 S.E.2d at 400 (holding that by enacting N.C.G.S. § 75-16, “our Legislature intended to establish an effective private cause of action for aggrieved consumers in this State”); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985) (stating that the purpose of N.C.G.S. § 75-16 was to “encourage private enforcement in the marketplace and to make the bringing of such a suit more economically feasible”).

Defendants contend that by amending N.C.G.S. § 75-16, the General Assembly merely intended to change the law to allow standing to recover for non-business injuries. In short, defendants contend that in enacting the 1969 revisions, the legislature sought to widen the standing provision to allow standing for additional types of injuries, but not to additional classes of persons. Defendants further contend that although the amendment was intended to protect consumers, this intent does not indicate that the General Assembly intended to allow recovery by indirect purchasers.

Defendants are correct insofar as the 1969 revisions clearly granted standing to those suffering non-business injuries. However, defendants’ contention that the General Assembly somehow intended to exclude a large class of persons—indirect purchasers—from recovery for non-business injuries is not persuasive. Instead, we hold that by enacting the 1969 revisions to N.C.G.S. § 75-16, the General Assembly clearly intended to expand the class of persons with standing to sue for a violation of Chapter 75 to include any person who suffers an injury under Chapter 75, regardless of whether that person purchased directly from the wrongdoer.

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

We find it significant that the General Assembly chose to amend N.C.G.S. § 75-16 by adding the phrase “if any person” to the beginning of the section. As it is currently written, N.C.G.S. § 75-16 provides standing to *any person* who suffers any injury, as well as for any business injury. By adding the above language, the General Assembly intended to provide a recovery for all consumers. *See Marshall*, 302 N.C. at 543-44, 276 S.E.2d at 400.

Defendants argue that consumers are not the same as indirect purchasers, since consumers sometimes purchase directly from the manufacturer or service provider. However, consumers often purchase goods from a wholesaler or retailer, and thus are often indirect purchasers. We find it unlikely that the legislature intended to “establish an effective private cause of action for aggrieved consumers in this State” *see Id.*, but intended to exclude from this remedy all indirect purchasers, many of whom are consumers.

In addition, defendants argue that we should interpret N.C.G.S. § 75-16 consistent with the United States Supreme Court’s interpretation of section 4 of the Clayton Act in *Illinois Brick*. Federal case law interpretations of the federal antitrust laws are persuasive authority in construing our own antitrust statutes. *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 656, 386 S.E.2d 200, 213 (1989); *Johnson v. Ins. Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980); *N. C. Steel v. National Council on Compensation Ins.*, 123 N.C. App. 163, 472 S.E.2d 578 (1996).

The most recent substantive revision to N.C.G.S. § 75-16 took place in 1969. (The General Assembly revised this section slightly in 1977 by removing the words “by a jury.” This revision did not alter the substance of this section). By contrast, *Illinois Brick* was not decided until 1977. It follows that our General Assembly could not have intended to adopt a judicial construction of N.C.G.S. § 75-16 which did not exist at the time of the revision. It is a familiar canon of statutory construction that when a legislature borrows from the statutes of another legislative body, the provisions of that legislation should be construed as they were in the other jurisdiction at the time of their adoption. *Shannon v. United States*, 512 U.S. —, —, 129 L. Ed. 2d 459, 467 (1994); *Carolene Products Co. v. United States*, 323 U.S. 18, 25-26, 89 L. Ed. 15, 21 (1944). Thus, in the subject case we consider as persuasive authority federal cases interpreting the federal antitrust laws as they existed in 1969.

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

The United States Supreme Court decided *Hanover Shoe* in 1968 and *Illinois Brick* in 1977. Since *Hanover Shoe* changed the manner in which direct purchasers were allowed to sue under the federal antitrust laws, and was later found by *Illinois Brick* to forbid an indirect purchaser from suing, we believe that federal cases between 1968 and 1977 are most instructive in discerning the state of federal antitrust laws when the General Assembly amended N.C.G.S. § 75-16 in 1969.

Prior to the United States Supreme Court's decision in *Illinois Brick*, most federal circuit courts construed section 4 of the Clayton Act to allow suits by indirect purchasers. See e.g., *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919, 39 L. Ed. 2d 474 (1974); *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276 (D.C. Cir. 1972); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc., v. Chas. Pfizer & Co.*, 404 U.S. 871, 30 L. Ed. 2d 115 (1971); *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, *reh'g denied*, 434 U.S. 881, 54 L. Ed. 2d 164 (1977); *but see Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (*per curiam*). We note further that the Fourth Circuit allowed an indirect purchaser to sue under section 4 of the Clayton Act in *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934, 17 L. Ed. 2d 215 (1966). Although this decision occurred before the Supreme Court's decision in *Hanover Shoe*, it represents the Fourth Circuit's most recent pronouncement on this issue prior to the amendments to N.C.G.S. § 75-16 in 1969.

Based on the foregoing, we conclude that the great weight of federal case law authority in 1969 held that indirect purchasers were allowed standing under section 4 of the Clayton Act. Thus, insofar as we consider federal precedent as persuasive authority regarding construction of N.C.G.S. § 75-16, we find that the relevant federal precedent counsels us to allow plaintiffs standing under N.C.G.S. § 75-16.

Defendants cite *Stifflear v. Bristol-Myers Squibb Co.*, No. 95 CA0201, 1996 WL 219232 (Colo. Ct. App. 1996), and *Abbott Laboratories, Inc. v. Segura*, 907 S.W.2d 503 (Tex. 1995) in support of their argument that indirect purchasers lack standing to sue under state antitrust laws patterned after section 4 of the Clayton Act. These cases, however, are distinguishable.

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

In *Stifflear*, the Colorado Court of Appeals held that indirect purchasers do not have standing to sue under the Colorado antitrust laws. *Id.* at *7. *Stifflear* is distinguishable from the instant case for two principal reasons.

First, Colorado's antitrust laws were modeled on Wisconsin's antitrust statute, which was itself modeled on the federal Sherman and Clayton Antitrust Acts. *Id.* at *3. Because the Colorado statute was patterned on the Wisconsin provision, the *Stifflear* Court stated:

Given the substantial similarity in text and purpose present in the federal and state antitrust statutes, we believe that federal decisions construing the Sherman and Clayton Acts, although not necessarily controlling on our interpretation of the Colorado law, are nevertheless entitled to careful scrutiny in determining the scope of the state antitrust statute.

Id. (quoting *People v. North Avenue Furniture & Appliance, Inc.*, 645 P.2d 1291, 1295-96 (Colo. 1982)). By contrast, our Supreme Court has stated only that federal cases are persuasive authority in construing our antitrust statutes. *Madison Cablevision*, 325 N.C. at 656, 386 S.E.2d at 213.

Second, Colorado substantially revised its antitrust laws in 1992. *Stifflear*, 1996 WL 219232 at *3. The revised Colorado antitrust law provides that: "The attorney general may bring a civil action on behalf of any governmental or public entity . . . injured, *either directly or indirectly*, in its business or property by reason of any violation of this article" Colo. Rev. Stat. § 6-4-111(2) (1992) (emphasis supplied). Section 6-4-111(3)(a) of the Colorado statutes provides: "The attorney general may bring a civil action as *parens patriae* on behalf of natural persons residing within the state who are injured in their business or property" Notably, this section does not include the language "injured, either directly or indirectly" which is found in § 6-4-111(2). The *Stifflear* Court found the absence of the phrase "either directly or indirectly" in § 6-4-111(3)(a) significant because the difference in statutory language indicated that the Colorado General Assembly considered whether to allow indirect purchasers to sue, and determined that the only indirect purchaser allowed to bring suit is a governmental agency. By contrast, our General Assembly has not substantively revised N.C.G.S. § 75-16 since the United States Supreme Court decision in *Illinois Brick*.

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

Since we consider federal case law only as persuasive authority, rather than giving it “careful scrutiny,” and because our General Assembly has not substantively revised N.C.G.S. § 75-16 since *Illinois Brick* was decided, we find *Stifflear* unpersuasive for this case.

Segura is also distinguishable from the instant case. In *Segura*, the Texas Attorney General sued the defendants seeking damages under the state antitrust act as *parens patriae* on behalf of consumers who purchased infant formula indirectly from the defendants. The Attorney General alleged that defendants engaged in price fixing and other activities which were illegal under Texas’ antitrust laws. *Segura*, 907 S.W.2d at 504. Private plaintiffs, representing a class of consumers who purchased infant formula indirectly from the defendants, intervened and sought damages for the same conduct for which the State of Texas sought damages. The private plaintiffs, however, alleged that defendants’ conduct violated Texas’ Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. § 17.50(a)(3) (1987). The private plaintiffs conceded that their claim would be barred under Texas’ antitrust laws, because the Texas Legislature mandates that Texas antitrust laws be harmonized with federal antitrust laws. *Segura*, 907 S.W.2d at 504-05. The Texas Supreme Court held that since the private plaintiffs’ claims would be barred under Texas antitrust laws, the claims must be barred under Texas’ Deceptive Trade Practices Act as well, in order to prevent an “end run” around the policies allowing only direct purchasers to recover under Texas’ antitrust laws. *Id.* at 505-06. Unlike the Texas Legislature, our General Assembly has not mandated that our antitrust laws be construed in harmony with federal antitrust laws.

Plaintiffs cite *Blake v. Abbott Laboratories, Inc.*, No. 03A01-9509-CV-00307, 1996 WL 134947 (Tenn. Ct. App. 1996) to support their argument that indirect purchasers have standing to sue under state antitrust statutes. The standing provision of the Tennessee statute provides: “Any person who is injured or damaged by any . . . arrangement, contract, agreement, trust, or combination described in this part may sue for and recover . . . from any person operating such trust or combination, the full consideration or sum paid” Tenn. Code Ann. § 47-25-106. The *Blake* Court held that this section grants standing to any person or persons injured under Tennessee antitrust laws “whether the individual is a direct purchaser or indirect purchaser.” *Blake*, 1996 WL at *3. *Blake* held that Tennessee antitrust laws are not identical to federal antitrust laws, and the *Illinois Brick* limitation did not apply in Tennessee. *Id.* at *3-4.

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

Since we are not required to construe our antitrust statute in harmony with the federal antitrust laws, we likewise find that the *Illinois Brick* limitation does not apply in North Carolina.

Defendants further contend that the General Assembly's failure to explicitly amend N.C.G.S. § 75-16 to allow an indirect purchaser standing to sue for violations of our antitrust laws demonstrates that the General Assembly accepted the *Illinois Brick* rule. We disagree. In *Styers v. Phillips*, 277 N.C. 460, 472, 178 S.E.2d 583, 590-91 (1971), our Supreme Court stated:

[T]he rule is that ordinarily the intent of the legislature is indicated by its actions, and not by its failure to act

In *James v. Young*, 77 N.D. 451, 43 N.W.2d 692, it was held that the legislature's failure to pass a bill "cannot be said to indicate any intent on the part of the legislature. A public policy is declared by the action of the legislature, not by its failure to act" In *Moore v. Board of Freeholders of Mercer County*, 76 N.J. Super. 396, 184 A.2d 748, the defendants argued that the failure of the legislature to pass a bill specifically authorizing a citizen to photocopy public records indicated a denial of the right. The court said, "[W]e decline to attribute any such attitude to the legislature. Defendant's conclusion can be nothing more than conjecture. Many other reasons for legislative inaction readily suggest themselves."

Id. See also *Blake*, 1996 WL at *3 (holding that the failure to enact legislation is not at all indicative of legislative intent).

The rule in North Carolina is clear that the intent of the General Assembly may only be discerned by its actions, and not its failure to act. As a result, the failure of the General Assembly to amend N.C.G.S. § 75-16 to allow an indirect purchaser to sue is of no consequence to the case *sub judice*.

We note further that the concerns which underlie the United States Supreme Court decision in *Illinois Brick* are less worrisome in the instant case. *Illinois Brick* set out several reasons why federal antitrust laws disallowed suits by indirect purchasers.

First, the *Illinois Brick* Court was concerned with the possibility of multiple liability. *Illinois Brick*, 431 U.S. at 730, 52 L. Ed. 2d at 715. The Court expressed belief that both a direct and an indirect purchaser would recover the full amount of the overcharge, thus sub-

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

jecting a defendant to liability greater than three times the amount of its antitrust violation. *Id.* However, there are few, if any, reported instances of a defendant paying treble damages to two different classes of purchasers based on a single antitrust violation. Thomas Greene, *Should Congress Preempt State Indirect Purchaser Laws? Counterpoint: State Indirect Purchaser Remedies Should be Preserved*, 5 WTR Antitrust 25, 26-27 (1990).

In addition, the United States Supreme Court in *Arc America* stated that *Illinois Brick* was concerned solely with the construction of federal antitrust laws, and not at all with state court constructions of state antitrust laws. *Arc America*, 490 U.S. at 102-03, 104 L. Ed. 2d at 95-96. The *Arc America* Court further stated, "[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." *Id.* at 103, 104 L. Ed. 2d at 96. Regarding the possibility of state law remedies resulting in multiple liability for antitrust defendants, *Arc America* held that there is no federal policy against states imposing liability in addition to that imposed by federal law. *Id.* at 105, 104 L. Ed. 2d at 97. In short, our appellate courts are free to interpret North Carolina antitrust laws in a manner we believe to be most consistent with the purposes behind our antitrust laws. We find that a slight risk of multiple liability is greatly outweighed by the benefit of advancing the aforementioned policies of N.C.G.S. § 75-16.

Second, the *Illinois Brick* Court was concerned that "requiring direct and indirect purchasers to apportion the recovery [in a proceeding under section 4 of the Clayton Act] would result in no one plaintiff having a sufficient incentive to sue under that statute." *Arc America*, 490 U.S. at 104, 104 L. Ed. 2d at 96-97. However, "State indirect purchaser statutes pose no similar risk to the enforcement of the federal law." *Id.* at 104, 104 L. Ed. 2d at 97. This is true because a defendant guilty of an antitrust violation would face paying damages to indirect purchasers under state antitrust laws as well as paying any damages awarded to direct purchasers under federal antitrust laws. As a result, both direct and indirect purchasers would have a sufficient incentive to sue for violations of Chapter 75 under our construction of N.C.G.S. § 75-16.

Finally, the *Illinois Brick* Court was concerned that allowing a suit by indirect purchasers would lead to highly complex litigation, due to the necessity of determining the proportion of the overcharge

HYDE v. ABBOTT LABORATORIES

[123 N.C. App. 572 (1996)]

which was passed on to indirect purchasers. *Illinois Brick*, 431 U.S. at 732, 52 L. Ed. 2d at 716-17. As plaintiffs conceded at oral argument, this concern is valid. It is clear that a suit by indirect purchasers under our antitrust laws will be complex. However, when asked at oral argument whether "chaos reigned" in states which have allowed indirect purchaser suits, defendants were unable to cite a single example. This failure to cite a single indirect purchaser case in which a court has been faced with an impossibly complex suit counsels us that a fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser, given the intent of the General Assembly to "establish an effective private cause of action for aggrieved consumers in this State." *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400.

The United States Supreme Court has stated that its interpretation of section 4 of the Clayton Act must "promote the vigorous enforcement of the antitrust laws." *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 214, 111 L. Ed. 2d 169, 184 (1990). The *Utilicorp* Court implied that it would have allowed indirect purchaser suits in the case before it if the Court was convinced that indirect purchaser suits would better promote the goals of the antitrust laws. *Id.*

We believe that allowing indirect purchasers to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress Chapter 75 violations. Accordingly, we hold that indirect purchasers have standing under N.C.G.S. § 75-16 to sue for Chapter 75 violations.

For the foregoing reasons, the decision of the trial court is reversed, and this case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges EAGLES and SMITH concur.

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

MARY KELLY, PLAINTIFF V. TIMOTHY C. OTTE, DEFENDANT

No. COA95-1121

(Filed 20 August 1996)

1. Divorce and Separation § 567 (NCI4th)— foreign child support order—New Jersey law applicable

While the trial court erred in finding and concluding that the foreign support order in this case was to be treated as an order by the State of North Carolina upon its registration (pursuant to former N.C.G.S. § 52A-30(a)) on the ground that the finding and conclusion violated the Full Faith and Credit for Child Support Orders Act (FFCCSOA), since a strict reading of § 52A-30(a) does violate the FFCCSOA, the trial court's reference to this section in its finding and conclusion was harmless error where the trial court recognized that the FFCCSOA required application of New Jersey law in interpreting the order.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149; Divorce and Separation §§ 1130-1142.

Decree for alimony rendered in another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings. 18 ALR2d 862.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 ALR4th 706.

2. Divorce and Separation § 563 (NCI4th)— parties and children no longer in New Jersey—order modified pursuant to North Carolina law—escalation clause void ab initio

Since the New Jersey court which entered the original order of child support lost continuing, exclusive jurisdiction of the order pursuant to the FFCCSOA in that the parties and the children moved to North Carolina, the trial court properly modified the foreign support order pursuant to N.C.G.S. § 50-13.7 by determining that the automatic escalation clause in this order based upon the Consumer Price Index for New York City was void *ab initio* under North Carolina law.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149; Divorce and Separation §§ 1130-1142.

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

Decree for alimony rendered in another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings. 18 ALR2d 862.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 ALR4th 706.

3. Divorce and Separation § 566 (NCI4th)— child support arrears—time for raising statute of limitations defense—consideration proper

The trial court did not err in finding and concluding that the statute of limitations barred the collection of child support arrears which accrued more than ten years preceding the filing of the Notice of Registration even though defendant failed to plead the statute of limitations prior to confirmation of the foreign support order, since defendant could raise the affirmative defense of the statute of limitations pursuant to N.C.G.S. § 50-13.10 because that statute permitted the modification or divestment of past due child support payments upon written motion and notice to all parties that the moving party was precluded by indigency or any other compelling reason from filing a motion before the payments were due, and defendant filed a Motion to Vacate and Set Aside Registered Foreign Support Order, more than four months after receiving notice of the registration, in which he alleged severe financial problems at the time his payments were due.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149; Divorce and Separation §§ 1133-1135.

Decree for alimony rendered in another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings. 18 ALR2d 862.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 ALR4th 706.

Appeal by plaintiff from order entered 3 July 1995 by Judge James R. Fullwood in Wake County District Court. Heard in the Court of Appeals 5 June 1996.

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

Attorney General Michael F. Easley, by Associate Attorney General Gerald K. Robbins, for plaintiff-appellant.

No brief filed by defendant-appellee.

JOHNSON, Judge.

This case presents an issue of first impression as to the effect of the Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B, Pub. L. No. 103-383) on the now-repealed North Carolina Uniform Reciprocal Enforcement of Support Act (URESA) (N.C. Gen. Stat. ch. 52A). The facts are as follows.

Plaintiff Mary Kelly and defendant Timothy C. Otte were married on 19 January 1975, and later divorced on 17 September 1981. There were two children born of the marriage—Timothy Devin Otte, born 27 July 1977, and Jennifer Arielle Otte, born 10 July 1979.

Prior to the parties' divorce, plaintiff and defendant entered into a property settlement agreement. This agreement was subsequently incorporated into and made a part of the parties' New Jersey divorce decree. Pursuant to the agreement, defendant agreed to pay support to plaintiff in the amount of \$300.00 per month for support of the two minor children. Defendant further agreed that beginning July 1982, his child support payments would be adjusted annually on 1 July in accordance with the United States Department of Labor Consumer Price Index for New York City.

After the divorce, plaintiff and the minor children moved to North Carolina. Thereafter, in 1983, defendant also moved to North Carolina. Defendant made regular monthly child support payments of \$300.00 through and including the month of July 1991; and beginning July 1991 through February 1994, defendant made monthly child support payments of \$360.00. Finally, in March 1994, defendant made a \$300.00 child support payment. Thereafter, until the registration of the New Jersey order, defendant failed to make another child support payment to plaintiff.

On 31 October 1994, plaintiff registered the 1981 New Jersey order with the Wake County Clerk of Superior Court. The Clerk forwarded a Notice of Registration of Foreign Support Order to defendant. The Notice of Registration claimed that as of 27 October 1994, there were total child support arrearages of \$17,442.72. Defendant was served with the Notice of Registration on 27 December 1994, but filed no response to the Notice until 26 April 1995.

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

On that date, defendant filed a Motion to Vacate and Set Aside Registered Foreign Support Order, alleging that the Consumer Price Index found in the New Jersey order was void as a matter of law and that the statute of limitations precluded enforcement of arrearages accruing on or before 31 October 1984. This motion came on for hearing before Judge James R. Fullwood in Wake County District Court on 5 May 1995. After hearing the arguments of both parties, the trial court entered an order on 3 July 1995, denying defendant's Motion to Vacate and Set Aside Registered Foreign Support Order with respect to arrearages accruing during the ten (10) year period immediately prior to the registration of the foreign support order in North Carolina, but granting said motion with respect to arrearages accruing prior to 27 October 1984; and ordering defendant to pay support in the amount of \$300.00 per month prospectively from the date of registration of the foreign order of support until further modification or termination of the support order. Plaintiff appeals.

At the outset, we must note that plaintiff has failed to comply with Rule 28 of the North Carolina Rules of Appellate Procedure. Rule 28 requires that immediately following each question presented in a brief, there be reference to the assignment(s) of error pertinent to the question, identified by their number and by the page at which they appear in the record. N.C.R. App. P. 28(b)(5). Plaintiff, however, presents three arguments on appeal without reference to their respective assignments of error or the page at which they appear in the record. As such, these arguments are not properly before us, and may be deemed abandoned. *Id.* In the interest of justice, irrespective of these violations, we choose to address plaintiff's arguments on appeal. N.C.R. App. P. 2.

[1] Plaintiff first argues that the trial court erred in finding and concluding that the foreign support order in this case is to be treated as an order by the State of North Carolina upon its registration (pursuant to section 52A-30(a)) on the grounds that the finding and conclusion violate the Full Faith and Credit for Child Support Orders Act (FFCCSOA). For the reasons discussed herein, we find that section 52A-30(a) does violate the FFCCSOA, but that the trial court's finding and conclusion, in and of itself, does not.

The FFCCSOA became effective on 20 October 1994. The FFCCSOA adds a new section to the United States Code, 28 U.S.C. § 1738B, which

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

- (1) requires the appropriate authorities of each state to “enforce according to its terms a child support order made consistently with [the act’s jurisdictional and due process standards] by a court of another State;” and
- (2) prohibits states from modifying, except as allowed under 28 U.S.C. § 1738B(e), a child support order that has been entered by another state’s court consistently with 28 U.S.C. § 1738B(c).

John L. Saxon, *The Federal “Full Faith and Credit for Child Support Orders Act”*, 5 INST. OF GOV’T FAM. L. BULL. 1, 2 (1995) [hereinafter Saxon](interpreting the FFCCSOA). Section 1738B(e) of the FFCCSOA allows modification of a child support order by a sister state if the rendering state loses continued, exclusive jurisdiction over the child support order. *See* 28 U.S.C. § 1738B(e) (Supp. 1996). The rendering state may lose continued, exclusive jurisdiction over the order if: “(1) neither the child nor any of the [parties] continue to reside in the state, *or* (2) each of the [parties] has consented to the assumption of jurisdiction by another state.” Saxon, at 3; *see* 28 U.S.C. § 1738B(e)(2). Under the Supremacy Clause of the United States Constitution, the provisions of the FFCCSOA are binding on all states and supersede any inconsistent provisions of state law, including any inconsistent provisions of uniform state laws such as URESA, which was adopted by North Carolina and previously codified at Chapter 52A of the North Carolina General Statutes. Saxon, at 2; *see Isabel M. v. Thomas M.*, 624 N.Y.S.2d 356 (1995).

In addition, the FFCCSOA also establishes uniform rules regarding the choice of law that state courts must follow in proceeding to enforce or modify out-of-state child support orders. *See* 28 U.S.C. § 1738B(g) (Supp. 1996). Section 1738B(g)(2) provides that the forum state must apply the law of the rendering state when *interpreting* an out-of-state child support order. 28 U.S.C. § 1738B(g)(2). When *enforcing* the rendering state’s child support order, however, section 1738B(g)(3) requires that the longer of the forum state’s statute of limitation and the rendering state’s statute of limitation be applied. 28 U.S.C. § 1738B(g)(3). In all other regards, section 1738B(g)(1) provides that the law of the forum state is to be applied in the proceeding to enforce foreign child support orders that are entitled to full faith and credit under the FFCCSOA. 28 U.S.C. § 1738B(g)(1). “This means that, with the possible exception of the statute of limitation, the procedures and remedies of the forum state will apply to the enforcement of out-of-state child support orders within the forum state.” Saxon, at 4.

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

Chapter 52A of the North Carolina General Statutes, North Carolina's version of URESA, was repealed by Session Laws 1995, effective 1 January 1996. However, this case was decided before chapter 52A was repealed, and as such is not affected by the rescission. *See* N.C. Gen. Stat. ch. 52A (1995) Editor's Note. Section 52A-30, entitled "Effect of registration; enforcement procedure" provided in pertinent part,

(a) Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner.

(b) The obligor has 20 days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition, the registered support order is confirmed.

N.C. Gen. Stat. § 52A-30(a),(b) (1992) (repealed 1995, effective 1 Jan. 1996). Sub-section (c) of this same section described the manner of *enforcement* of a registered foreign support order. *See* N.C. Gen. Stat. § 52A-30(c) (1992) (repealed 1995, effective 1 Jan. 1996). To the extent that this section directly conflicts with the purposes of the FFCCSOA, it is superseded by the FFCCSOA. Saxon, at 4; *Isabel M.*, 164 N.Y.S.2d 356.

In the instant case, plaintiff registered a foreign order of support with the Wake County Clerk of Superior Court on 31 October 1994, in accordance with section 52A-29 of the General Statutes. At that time, she, defendant, and their two minor children all resided in North Carolina. As such, the rendering state of New Jersey had lost continuing, exclusive jurisdiction over the New Jersey support order. *See* 28 U.S.C. § 1738B(e). Defendant was served with Notice of Registration in accordance with section 52A-29, but failed to respond within the twenty-day statutory period provided by section 52A-30. Accordingly, the registered support order was subsequently confirmed.

In its order, the trial court made the following finding and conclusion:

10. That the foreign support order is treated as an order issued by a court of North Carolina upon registration pursuant to North Carolina General Statute[s] [§]52A-30(a).

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

Plaintiff takes issue with this statement, alleging that such is in violation of the FFCCSOA. As section 52A-30(a) provides that a registered foreign support order shall be “subject to the same procedures, defenses, and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner,” N.C.G.S. § 52A-30(a), in direct contravention of the mandates of the FFCCSOA, this finding is erroneous. However, recognizing the mandates of the FFCCSOA, the trial court made a further finding and conclusion:

13. That North Carolina must enforce the foreign order of support according to its terms pursuant to The Federal “Full Faith and Credit for Child Support Act,” and must apply the law of the rendering state, New Jersey[,] in this case, when interpreting a foreign order of support.

Under the present circumstances, we find that the trial court, in no way, intended that North Carolina law control the interpretation of the New Jersey order. The court only intended that its finding and conclusion number 10 address the manner in which North Carolina courts acquire jurisdiction to *enforce* foreign orders and the procedures and remedies that may be utilized to do so. The trial court in no way intended to imply that registration “transmuted” the foreign support order, but merely intended to note that registration gives the courts of this state the ability to enforce foreign orders that have come to their attention. As such, though the strict reading of section 52A-30(a) does violate the FFCCSOA, the trial court’s reference to the section in its finding and conclusion number 10 was harmless error, in no way prejudicial to plaintiff, as the trial court recognized that the FFCCSOA required application of New Jersey law in interpreting the order.

[2] Plaintiff also argues that the trial court erred in finding and concluding that since the date of registration the “escalation clause” of the support order is void since such a finding and conclusion violate the FFCCSOA. We cannot agree.

The FFCCSOA is very stringent in its mandate that a foreign child support order be enforced according to its terms. However, there are certain circumstances under which modification of an order can be made. Section 1738B(b) defines a “modification” as “a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.” 28 U.S.C. § 1738B(b) (Supp.

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

1996). As stated above, section 1738B(e) of the FFCCSOA allows modification of a child support order by a sister state if the rendering state loses continued, exclusive jurisdiction over the child support order. 28 U.S.C. § 1738B(e). This may occur in one of two ways: if “(1) neither the child nor any of the [parties] continue to reside in the state, *or* (2) each of the [parties] has consented to the assumption of jurisdiction by another state.” Saxon, at 3.

In the instant case, the trial court made the following findings of fact:

9. That automatic escalation clauses entered by North Carolina courts in child support cases are void ab initio in North Carolina.

10. . . . Prospectively, since the date of registration of the foreign order of support in North Carolina, and confirmation of said registration, the automatic escalation clause of the support order is void and unenforceable under North Carolina law.

11. That accordingly, the parties agree and stipulate through counsel that the on-going order of support from the date of registration in North Carolina is limited to \$300.00 per month.

. . .

14. That each child support payment is vested when it accrues and is subject to retroactive modification only from the date a motion for modification based upon change of circumstances is filed with the court pursuant to New Jersey Statutes Annotated 2A:17-56.23.

15. That vested past due child support payments are entitled to full faith and credit pursuant to New Jersey Statutes Annotated 2A:17-56.23a. Because the arrears under the New Jersey order[] of support are vested and entitled to enforcement as a judgment, and are not subject to retroactive modification under New Jersey law, North Carolina must enforce the foreign order according to its terms and has no authority to retroactively modify the arrearages under the New Jersey order of support.

Since the New Jersey court which entered the original order of child support has lost continuing, exclusive jurisdiction of the order pursuant to § 1738B(e), the trial court properly modified the foreign support order in accordance with North Carolina law. Pursuant to section 50-13.7 of our General Statutes, a child support order may only be modified upon a showing of changed circumstances. N.C. Gen.

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

Stat. § 50-13.7 (1995). As such, the automatic escalation clause herein was properly found to be void *ab initio* by the trial court. Plaintiff's arguments to the contrary are, therefore, without merit.

[3] Plaintiff's final argument on appeal is that the trial court erred in finding and concluding that the statute of limitation barred the collection of child support arrears which accrued more than ten (10) years preceding the filing of the Notice of Registration since the statute of limitation is an affirmative defense which should have been pled prior to confirmation of the foreign support order. After review, we find this argument to be unpersuasive.

In the instant action, North Carolina law governs the manner and procedure to be utilized in enforcing the child support order in the instant action. 28 U.S.C. § 1738B(g)(1); *see* Saxon, at 4. Section 52A-30(b) of the North Carolina General Statutes, which is now repealed, provided:

The obligor has 20 days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition, the registered support order is confirmed.

N.C.G.S. § 52A-30(b). After an order was confirmed, a second step to enforce the order had to be taken. *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980). Section 52A-30(c), also repealed, provided in pertinent part:

At the hearing to enforce the registered support order, the obligor may present only matters that would be available to him [or her] as defenses in an action to enforce a foreign money judgment.

N.C.G.S. § 52A-30(c). Plaintiff is correct in her statement that a defendant in a proceeding to enforce a registered support order is limited to an attack on the order on the grounds of the existence of fraud in the procurement, as being against public policy, or lack of jurisdiction. *Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993).

Plaintiff, however, has overlooked section 50-13.10 of the General Statutes, which allows the modification or divestment of past due child support payments upon written motion and notice to all parties either: "(1) [b]efore the payment is due [;] or (2) [i]f the moving party is precluded by physical disability, mental incapacity, *indigency*, misrepresentation of another party, *or other compelling reason* from fil-

KELLY v. OTTE

[123 N.C. App. 585 (1996)]

ing a motion before the payment is due, then promptly after the moving party is no longer so precluded." N.C. Gen. Stat. § 50-13.10 (1995). Therein, a party is not limited to the defenses that may be utilized in contesting enforcement of a foreign money judgment; and may at that time raise the affirmative defense of the statute of limitation. We find no support for plaintiff's argument that defendant has waived the defense of the statute of limitation, because he failed to raise it prior to the confirmation of the order pursuant to now-repealed section 52A-30(b) of the General Statutes.

The facts in the case *sub judice* show the following: On 26 April 1995, defendant filed a Motion to Vacate and Set Aside Registered Foreign Support Order, more than four months after receiving notice of the registration, in derogation of section 52A-30(b). Therein, he noted that at the time that his past due child support payments had become due, he had been having "severe financial problems," after being laid off from his employment of twenty-one (21) years; that he had resumed making payments again after obtaining part-time employment, but had been unable to make further payments at the time that he had received the Notice of Registration of Foreign Support Order in this action, as he had been involuntarily terminated from that job; that the registered order was void and unenforceable in North Carolina with respect to those increases accruing under the automatic escalation clause after he had moved to North Carolina; that a portion of the past due support payments had vested more than ten (10) years previously and was, therefore, barred by a ten (10) year statute of limitation; and that plaintiff's signature on the Verified Statement of Fact for Registration of Foreign Support Order was in violation of Rule 11(a) of the North Carolina Rules of Civil Procedure.

Subsequently, on 5 May 1995, the trial court held a hearing on defendant's motion. Implicitly in granting defendant a hearing on his motion, the trial court found the requisite provisions of section 50-13.10 to be satisfied. After hearing arguments of counsel for both parties, the trial court found that a portion of the past due support payments were indeed barred by a ten (10) year statute of limitation. Notably, plaintiff and defendant both agreed and stipulated that the ten (10) year statute of limitation would govern the instant action. This matter, being properly before the trial court, and the New Jersey court having lost continuing, exclusive jurisdiction of the order, we find no error in the trial court addressing this defense as raised by defendant's Motion to Vacate and Set Aside Registered Foreign Support Order.

WILLIAMS v. CITY OF DURHAM

[123 N.C. App. 595 (1996)]

In light of the foregoing, the trial court's order is affirmed.

Affirmed.

Judges LEWIS and MARTIN, MARK D. concur.

BARBARA J. WILLIAMS, PLAINTIFF v. THE CITY OF DURHAM, DEFENDANT AND THIRD-PARTY PLAINTIFF v. EURO CLASSICS, LTD., THIRD-PARTY DEFENDANT AND THIRD-PARTY PLAINTIFF v. DURHAM COUNTY, THIRD-PARTY DEFENDANT

No. COA95-276

(Filed 20 August 1996)

Highways, Streets, and Roads § 54 (NCI4th); Negligence § 150 (NCI4th)—fall on defective sidewalk—no duty of abutting landowner to maintain

In an action against defendant city to recover for injuries sustained by plaintiff when she fell upon a "sunken, depressed area" of a public sidewalk wherein the city commenced a third-party action against defendant auto sales and repair business, alleging that third-party defendant failed to properly maintain the level of its driveway as required by the city code and breached its common law duty to repair or properly construct the sidewalk abutting its property when it installed its driveway approach, the trial court properly entered summary judgment for third-party defendant, since the purpose of the section of the city code in question was not to protect a class of persons, *i.e.*, pedestrians, from injury resulting from failure to maintain driveways in good repair, and defendant therefore could not be found liable based upon the notion that its alleged violation of the code constituted negligence *per se*; there was no common law duty on the part of defendant property owner to repair sidewalk defects caused by the owner's use of the sidewalk as a driveway, as the common law rule is that the duty to keep sidewalks reasonably safe rests with the municipality rather than with abutting landowners; there was no indication in the record that defendant "actively created" a defect in the driveway, the allegation simply being that customary use of the driveway by vehicles over the years caused "normal

WILLIAMS v. CITY OF DURHAM

[123 N.C. App. 595 (1996)]

deterioration”; and using a portion of the sidewalk as a driveway does not constitute a “special use” such that the abutting property owner has a duty to repair damage to the sidewalk caused by such activity.

Am Jur 2d, Highways, Streets, and Bridges §§ 103-105, 340-342, 345-348, 394, 487.

Insufficiency of notice of claim against municipality as regards statement of place where accident occurred. 69 ALR4th 484.

Appeal by defendant and third-party plaintiff City of Durham from consent judgment entered 15 December 1994 by Judge Anthony M. Brannon and summary judgment entered 29 March 1993 by Judge Robert L. Farmer in Durham County Superior Court. Heard in the Court of Appeals 5 December 1995.

Faison & Fletcher, by Reginald B. Gillespie, Jr., and Keith D. Burns, for defendant and third-party plaintiff-appellant City of Durham.

Porter & Steel, PLLC, by Charles L. Steel, IV, and Susan Haney Hargrove, for third-party defendant-appellee Euroclassics, Ltd.

Bentley & Kilzer, by Charles A. Bentley, Jr. and Susan Kilzer

Durham County Attorney's Office, by Lowell L. Siler for Durham County.

JOHN, Judge.

Defendant and third-party plaintiff City of Durham (the City) appeals a consent judgment designating as a “final judgment” the trial court’s previous entry of summary judgment in favor of third-party defendant Euroclassics, Ltd. (Euroclassics). The City contends summary judgment was improper. We disagree.

Pertinent facts and procedural information are as follows: plaintiff Barbara J. Williams instituted the instant action 3 April 1992 against the City in consequence of injuries sustained in falling upon “a sunken, depressed area” of a public sidewalk in Durham. Plaintiff’s complaint alleged, *inter alia*, that the City breached its duty to maintain said public sidewalk in a reasonably safe condition for pedestrian travel.

WILLIAMS v. CITY OF DURHAM

[123 N.C. App. 595 (1996)]

The City filed answer denying liability, and on 21 September 1992 commenced a third-party action against Euroclassics, an auto sales and repair business located on property abutting the portion of sidewalk upon which plaintiff fell. The City alleged plaintiff's injury was caused by the negligence of Euroclassics in that the latter: (1) "failed to properly maintain the level of its driveway as required by § 18-63 of the Durham City Code," and (2) "breached its common-law duty to repair or properly construct the sidewalk abutting its property when it installed its driveway approach."

Euroclassics' subsequent motion for summary judgment was allowed 29 March 1993 and the City appealed. However, this Court dismissed the appeal as interlocutory. The City thereafter reached a settlement with plaintiff, and a consent judgment filed 15 December 1994 designated the earlier entry of summary judgment in favor of Euroclassics a "final judgment." On 9 January 1995, the City again filed notice of appeal to this Court.

Summary judgment is proper only where

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.R. Civ. P. 56(c). The burden of establishing the lack of a triable issue rests with the moving party, and the facts will be viewed in the light most favorable to the non-moving party. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985).

The City advances several theories under which it contends Euroclassics may be held liable for plaintiff's injuries. First, the City points to § 18-63 of the Durham City Code (the Code), and argues the provisions thereof establish a duty of care on the part of Euroclassics to maintain the sidewalk abutting its property. Upon breach of that duty, the City continues, Euroclassics is liable to pedestrians injured by its negligence. The Code section at issue provides:

Driveway approaches shall cross the sidewalk area at the sidewalk grade established by the City.

In essence, the City argues violation of the foregoing Code section constitutes negligence *per se*. We agree that public safety statutes customarily set forth a standard of care such that noncompliance constitutes negligence *per se*. See *Baldwin v. GTE South*,

WILLIAMS v. CITY OF DURHAM

[123 N.C. App. 595 (1996)]

Inc., 110 N.C. App. 54, 57, 428 S.E.2d 857, 859, *cert. denied*, 334 N.C. 619, 435 S.E.2d 331 (1993), *rev'd on other grounds*, 335 N.C. 544, 439 S.E.2d 108 (1994). However,

not every statute purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation.

Id. This Court must examine the purpose of the ordinance in deciding whether to adopt its behavioral mandate as the standard of care for a reasonable person. *Id.* at 57, 428 S.E.2d at 859-60.

The court may adopt as the standard of conduct of a reasonable [person] the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

Id. at 58, 428 S.E.2d at 860 (quoting Restatement (Second) of Torts § 286 (1965)).

Scrutiny of the Code provision in question reveals that, although it may have “generalized safety implications,” *id.* at 57, 428 S.E. 2d at 859, it is not a public safety law. The section can fairly only be read to mandate that driveways intersecting sidewalks be constructed and installed at a height level with that of the adjacent sidewalk. The statute in no way establishes a requirement that abutting property owners repair damage to driveways so that pedestrians do not, for example, trip and fall upon holes in the surface thereof.

In short, we decline to find the purpose of Code § 18-63 to be “to protect a class of persons,” *i.e.*, pedestrians, from injury resulting from failure to maintain driveways in good repair. *See id.* at 58, 428 S.E.2d at 860. Accordingly, Euroclassics may not be found liable based upon the notion that its alleged violation of § 18-63 of the Code constituted negligence *per se*.

WILLIAMS v. CITY OF DURHAM

[123 N.C. App. 595 (1996)]

The City next posits a common law duty on the part of a property owner to repair sidewalk defects caused by the owner's use of the sidewalk as a driveway. The City claims wear and tear occurred in the area comprising the intersection of Euroclassics' driveway with the sidewalk due to the automobiles of employees and customers regularly driving in and out of the business over that portion of the sidewalk.

The well-established common law rule is that the duty to keep sidewalks in a reasonably safe condition rests with the municipality rather than with abutting landowners. *See* 19 Eugene McQuillin, *The Law of Municipal Corporations* § 54.42.20 (3d ed. 1994); C.P. Jhong, Annotation, *Liability of abutting owner or occupant for condition of sidewalk*, 88 A.L.R.2d 331, 340 (1963). In North Carolina, this duty is imposed as well by statute; N.C.G.S. § 160A-296(a)(1) states cities shall have the "duty to keep the public streets, sidewalks, alleys, and bridges in proper repair." Nothing else appearing, therefore, the City's reliance on the common law is unavailing.

However, citing *Dunning v. Warehouse Co.*, 272 N.C. 723, 725, 158 S.E.2d 893, 895 (1968) (liability to pedestrians limited to condition "created or maintained" by landowner and "must be predicated on his negligence in that respect"), the City asserts that abutting landowners may be liable in limited circumstances for injuries caused by sidewalk defects they themselves have actively created. *See also* McQuillin, *supra* (owner of premises abutting sidewalk under "duty to refrain from any affirmative act that would render the sidewalk dangerous for public travel").

In *Dunning*, defendant warehouse cut through and removed a section of the abutting sidewalk to construct a drainage culvert. Defendant placed a thin metal sheet over the opening and then covered it with a layer of concrete. Plaintiff was injured when she stepped through the metal sheet, which was weakened with rust and corrosion and exposed due to broken concrete. The Court held the evidence "was sufficient to permit the jury to find the defendant created the defective condition which resulted in plaintiff's injuries." 272 N.C. at 725, 158 S.E.2d at 895.

The City therefore argues that, by using a portion of the sidewalk as a driveway and thereby eroding the sidewalk surface over the years, Euroclassics may be said to have "created" a defect in the sidewalk. The Appellate Court of Illinois, when requested to hold that a service station had "created" a hole in a sidewalk by allowing the pas-

WILLIAMS v. CITY OF DURHAM

[123 N.C. App. 595 (1996)]

sage of automobiles in and out of the intersecting driveway, responded:

An abutting landowner has a right to make reasonable use of sidewalks and driveways for the ingress and egress from his property. . . . There was no showing that [defendant gas station] actively created an unsafe condition other than speculation that normal deterioration incident to the use of the driveway occurred over time.

Repinski v. Jubilee Oil Co., 405 N.E.2d 1383, 1389-90 (1980).

As in Illinois, North Carolina landowners have a basic right to access public highways from their property. *Dept. of Transportation v. Harkey*, 308 N.C. 148, 151, 301 S.E.2d 64, 67 (1983). Furthermore, unlike the circumstances in *Dunning* upon which the City relies, there is no indication in the instant record that Euroclassics "actively created," *Repinski*, 405 N.E.2d at 1389, a defect in the driveway which caused plaintiff's fall, the allegation simply being that customary use of the driveway by vehicles over the years caused "normal deterioration," *id.* at 1390, in the sidewalk portion of the surface. The City's reliance on the "created defect" theory of liability thus is also unfounded.

However, the City further contends that using a portion of the sidewalk as a driveway constitutes a "special use" such that the abutting property owner has a duty to repair damage to the sidewalk caused by such activity. Indeed, certain jurisdictions have adopted this modification of the common law. *See generally*, 88 A.L.R.2d, *supra*, at 383-86.

The "special use" exception may be summarized as follows:

Where a sidewalk was constructed or altered for the special benefit of the abutting property and served a use independent of the ordinary use for which sidewalks are designed, or where a sidewalk, though not specifically constructed or altered for the special benefit of the abutting property, has been used for such benefit, the owner or occupant of the property . . . owes a duty to the public to maintain the sidewalk in a reasonably safe condition, and hence he may be held liable for injuries resulting from a defective or dangerous condition created by such special use of the sidewalk, particularly where such use is improper, extraordinary, or excessive under the circumstances.

Id. at 380.

WILLIAMS v. CITY OF DURHAM

[123 N.C. App. 595 (1996)]

It is unnecessary for us to consider whether to adopt the "special use" exception. Assuming *arguendo* the exception to be applicable in North Carolina, we do not believe the record in the case *sub judice* supports a determination that Euroclassics' use of a portion of the sidewalk for ingress and egress to its business constituted a "special use" imposing a duty to repair.

As noted above, the City's contention below was merely that ordinary use of the driveway in question over the years for ingress and egress of vehicles caused a deterioration in the sidewalk portion of the surface. Regarding a similar allegation, a California court stated:

Certainly, in this day and age, the use of a sidewalk as a driveway to the abutting property is not a peculiar or unusual use of such sidewalk. It is one of the ordinary and accustomed uses for which sidewalks are designed. . . . The use of part of the sidewalk as a driveway is imperative in most, if not all, locations. Such use is no more peculiar or unusual than using the sidewalk for pedestrians who desire to visit the owners of the abutting property.

Winston v. Hansell, 325 P.2d 569, 573 (Cal. Dist. Ct. App. 1958).

Further, the Supreme Court of Alabama observed that customers who gain access to a business via a driveway running over the sidewalk are "as much a part of the traveling public when crossing the sidewalk as when they were driving in the streets approaching it." *City of Bessemer v. Brantley*, 65 So.2d 160, 165 (1953). *Cf. State v. Perry*, 230 N.C. 361, 364, 53 S.E.2d 288, 290 (1949) (driveway over sidewalk considered public highway for purposes of statute criminalizing driving under the influence on public highways; "When [a proprietor] and those whom he invites to visit his premises exercise this right of ingress and egress, they pass from private property to public way at the property line."). Accordingly, stated the Alabama court,

[w]e cannot see that the liability of [an abutting property owner or lessee] is different from that which would have existed had the appellee been injured by a depression, not in the sidewalk, but in the street.

Id.

Under the circumstances *sub judice*, therefore, the record reflects no "special use" of the sidewalk portion of the driveway in question save for normal ingress and egress by automobiles of patrons and employees of Euroclassics. *See also Whitlow v. Jones*,

RADZISZ v. HARLEY DAVIDSON OF METROLINA

[123 N.C. App. 602 (1996)]

895 P.2d 324, 326 (Or. Ct. App. 1995) (“[A]lthough a business establishment [here, an apartment complex] derives special advantage from the use of a sidewalk by its business invitees for ingress to and egress from the business, that use is not a special use for liability purposes, because it is customary and normal.”); *Votsis v. Ward’s Coffee Shop, Inc.*, 231 S.E.2d 236 (Va. 1977) (use of sidewalk by customers of coffee shop and supermarket to obtain access to parking lot was lawful and normal, and imposed no duty on those businesses to repair sidewalk); see generally 88 A.L.R.2d, *supra*, at 386-89.

We note in closing that we have not been called upon to address, and therefore express no opinion regarding, whether a municipality may delegate by ordinance its duty to repair sidewalk damage to an abutting landowner, and further whether, if such duty may be delegated, a landowner may be held liable to a pedestrian injured in consequence of the landowner’s failure to comply with such ordinance.

As the City showed no legal duty on the part of Euroclassics to repair defects alleged to have existed in the latter’s driveway, Euroclassics was entitled to judgment as a matter of law on the City’s third-party claim, and the trial court did not err by entering summary judgment in favor of Euroclassics.

Affirmed.

Judge LEWIS concurs.

Judge WYNN concurs in the result only.

DAVID EUGENE RADZISZ, PLAINTIFF-EMPLOYEE v. HARLEY DAVIDSON OF
METROLINA, INC., DEFENDANT-EMPLOYER, AND UNIVERSAL UNDERWRITERS,
DEFENDANT-CARRIER

No. COA95-323

(Filed 20 August 1996)

**Workers’ Compensation § 86 (NC14th)— settlement with
third-party tortfeasor—reimbursement of employer and
workers’ compensation carrier required**

The General Assembly intended N.C.G.S. § 97-10.2(f) to mandate reimbursement of defendant employer and defendant work-

RADZISZ v. HARLEY DAVIDSON OF METROLINA

[123 N.C. App. 602 (1996)]

ers' compensation carrier, and the Industrial Commission thus erred in determining defendants possessed no lien interest in sums received by plaintiff through settlement with the third-party tortfeasor prior to resolution of this workers' compensation claim.

Am Jur 2d, Workers' Compensation § 456.

Right of workers' compensation insurer or employer paying to a workers' compensation fund, on the compensable death of an employee with no dependents, to indemnity or subrogation from proceeds of wrongful death action brought against third-party tortfeasor. 7 ALR5th 969.

Appeal by defendants from Opinion and Award entered 13 December 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 December 1995.

Tim L. Harris & Associates, by Rebecca L. Thomas, for plaintiff-appellee.

Golding, Meekins, Holden, Cospers & Stiles, by Henry C. Byrum, Jr. and Scott A. Beckey, for defendants-appellants.

JOHN, Judge.

Defendants appeal an award to plaintiff of benefits under the Worker's Compensation Act (the Act) by the North Carolina Industrial Commission (the Commission), contending the "Commission err[ed] in concluding defendants were not entitled to a subrogation interest or lien interest against the third-party settlement received by plaintiff [under] N.C.G.S. § 97-10.2." We agree.

Pertinent factual and procedural background information is as follows: Plaintiff, a motorcycle mechanic employed by defendant-appellant Harley-Davidson of Metrolina, Inc. (Harley), was involved in a collision with an automobile 1 June 1990 while operating a customer's motorcycle. As a consequence of injuries received in the accident, plaintiff subsequently filed both a workers' compensation claim with defendants and a civil action against the owners of the automobile ("third-party"). Defendants denied the claim, and defendant Universal Underwriters (Universal), Harley's workers' compensation carrier, informed the third-party's liability insurance carrier of

RADZISZ v. HARLEY DAVIDSON OF METROLINA

[123 N.C. App. 602 (1996)]

defendants' potential subrogation lien against any civil recovery. Universal further requested that no settlement funds be disbursed to plaintiff until the lien had been satisfied.

On 24 September 1990, plaintiff and the third-party agreed to a settlement of the civil action in the amount of \$25,000. On 8 November 1990, plaintiff and defendants entered into a Settlement Stipulation, providing in relevant part as follows:

In order to accommodate the potential workers' compensation lien on the proceeds of the civil action, [the parties] hereby execute this Stipulation and Agreement whereby [plaintiff] stipulates that if his worker's compensation claim is upheld by the Industrial Commission or if [defendants] file a written admission of liability for benefits with the Commission, [defendants] will have a lien, as provided in G.S. § 97-10.2, against these proceeds, and stipulates that they will be entitled to a credit against the workers compensation benefits to the extent that they have a subrogation interest in the proceeds of the settlement of the civil action. The amount of this subrogation interest is to be determined as if the civil action were settled after the total amount of the worker's compensation lien is determined by the Industrial Commission or a court, and is to be determined in accordance with G.S. § 97-10.2. The parties specifically reserve the right to contest the issue of the amount of the lien. . . . As of the date of execution of this agreement, [plaintiff] contends that no such interest exists in this case. This Agreement is not to be construed as granting or conceding the existence of any potential subrogation interest until [plaintiff's] workers compensation claim is honored.

A Consent Order requiring payment of \$25,000 by the third-party to plaintiff was thereafter entered 16 November 1990, and the funds were subsequently disbursed to plaintiff.

Following a 24 April 1992 hearing before a deputy commissioner, plaintiff was awarded workers' compensation benefits. The deputy commissioner further determined that "[p]ursuant to the agreement between all the parties to the consent judgment," defendants were entitled to a lien or credit against plaintiff's recovery from the third-party.

Plaintiff appealed to the Full Commission, which, in a 13 December 1994 Opinion and Award, concluded:

RADZISZ v. HARLEY DAVIDSON OF METROLINA

[123 N.C. App. 602 (1996)]

As defendants did not admit liability for [plaintiff's] injury and instead denied and contested liability, and as no final award has been entered by the Industrial Commission, defendants shall have no subrogation interest or lien [under G.S. § 97-10.2(f)(1)] as to the \$25,000 third party settlement.

Continuing, the Commission noted:

[t]he settlement stipulation entered into by the parties does not purport . . . to create a subrogation interest . . . [in that] N.C.G.S. § 97-10.2's requirements, and not any stipulated agreement to another effect by the parties, controls this matter.

From this order, defendants filed timely notice of appeal.

The issue presented is whether the Commission erred in denying defendants a subrogation or lien interest against the proceeds received by plaintiff in settlement of the civil action.

Distribution of amounts recovered from a third party tortfeasor, and the rights of the employee, the employer, and the employer's insurance carrier with respect thereto, are governed by G.S. § 97-10.2. See *Hogan v. Johnson Motor Lines*, 38 N.C. App. 288, 292, 248 S.E.2d 61, 63 (1978). The statute provides in pertinent part:

(f)(1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs . . . and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

RADZISZ v. HARLEY DAVIDSON OF METROLINA

[123 N.C. App. 602 (1996)]

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

.....

(g) The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death . . . and such lien may be enforced against any person receiving such funds. Neither the employee . . . nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other

G.S. § 97-10.2(f)(g)(h) (1991).

In the case *sub judice*, plaintiff maintains the Commission correctly interpreted G.S. § 97-10.2, asserting that “either a written admission or a final award is a condition precedent for [defendants] to claim a lien on third-party proceeds.” As neither had taken place at the time of settlement between plaintiff and the third-party, plaintiff continues, defendants possessed no subrogation interest in the settlement funds.

Conversely, defendants argue the Commission’s denial of a subrogation interest amounted to “an incorrect application of [G.S. § 97-10.2(f)(1)] and interpret[ation of] case law.” Specifically, defendants contend G.S. § 97-10.2 “entitles [them] to a subrogation interest or lien against the third-party settlement received by plaintiff,” and “the settlement stipulation and agreement signed by [the parties] acknowledges [such] rights”

Resolution of the issue herein requires construction of G.S. § 97-10.2 in such a manner as fulfills the legislative intent and purpose. *See Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 368-69, 250 S.E.2d 271, 273 (1979). “In seeking to discover this intent, [we must] consider the language of the statute, the spirit of the act, and what the act seeks to accomplish.” *See Taylor v. J. P. Stevens*, 57 N.C. App. 643, 644-45, 292 S.E.2d 277, 279 (1982).

Initially, we observe that “[t]he payor of benefits under the Workers’ Compensation Act is generally entitled to reimbursement

RADZISZ v. HARLEY DAVIDSON OF METROLINA

[123 N.C. App. 602 (1996)]

from the proceeds received from the third party tortfeasor.” *Buckner v. City of Asheville*, 113 N.C. App. 354, 358, 438 S.E.2d 467, 469 (1994) (citing 2A Arthur Larson, *The Law of Workmen’s Compensation* § 74.31(a), at 14-481 (1993)). Reimbursement “of any duplicative amounts received” protects against double recovery because where “[t]here is one injury, [there is] still only one recovery.” *See Andrews v. Peters*, 55 N.C. App. 124, 131, 284 S.E.2d 748, 752 (1981), *disc. review denied*, 305 N.C. 395, 290 S.E.2d 364 (1982). Indeed, most jurisdictions hold public policy requires prohibition of double recovery in that

[i]t is . . . elementary that the [employee] should not be allowed to keep the entire amount both of his [workers’] compensation award and of his common-law damage recovery. The obvious disposition of the matter is to give the employer so much of the negligence recovery as is necessary to reimburse [it] for [its] compensation outlay, and to give the employee the excess. This is fair to everyone concerned: the employer, wh[ic]h in a fault sense, is neutral, comes out even; the third person pays exactly the damages he would normally pay . . . and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone.

2A Larson at § 71.20.

Our Supreme Court has likewise applied this principle of prohibition against double-recovery to negligence actions against multiple tortfeasors, stating:

[T]he weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage.

Holland v. Southern Public Utilities Co. Inc., 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935).

Bearing the foregoing in mind, we commence analysis of G.S. § 97-10.2 by examination of the express statutory language. Contrary to plaintiff’s assertions, the provisions of the statute cannot logically be construed as requiring establishment of a “condition precedent” in the nature of a “written admission or a final award” before a payor of workers’ compensation benefits obtains subrogation rights. Rather,

RADZISZ v. HARLEY DAVIDSON OF METROLINA

[123 N.C. App. 602 (1996)]

we believe the section mandates that the payor of benefits be reimbursed with "duplicative amounts received" by plaintiff from a civil suit, *see Andrews*, 55 N.C. App. at 131, 284 S.E.2d at 752, regardless of which recovery (workers' compensation or civil action) occurs first.

For example, sub-section (h) of G.S. § 97-10.2 explicitly establishes that "every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party . . .," but contains no provision for any temporal requirement to such a lien. The language "to the extent of his interest under (f)" thus refers to the priority of benefits set out in sub-section (f)(1)(a.)-(d.), and does not, as plaintiff insists, require that defendants have made payment of "compensation or medical benefits . . . at the time the third party made payment, [or else] the extent of [defendants'] interest in the lien under subsection (f) was zero." As defendants aptly contend, "the legislature certainly never intended that the employee gain a double recovery by settling his third-party claim first, claiming payments under the Act second, and denying the employer reimbursement third." *See Hogan v. Johnson Motor Lines*, 38 N.C. App. 288, 291-92, 248 S.E.2d 61, 63 (1978) (protection of employer's right to reimbursement and prohibition against double-recovery by injured employee continuously maintained in Act by General Assembly, although original requirement that employee elect between receiving compensation under Act and seeking judgment against third party later modified to allow employee to seek recovery both through Act and civil suit).

Finally, such an interpretation of G.S. § 97-10.2(f) accomplishes the "two-fold" purpose of the Act, *i.e.*, "to provide swift and sure compensation to injured workers without the necessity of protracted litigation," and to "insure[] a limited and determinate liability for employers." *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982). For example, an employer's right to consent in writing to a settlement between the injured worker and a third-party, as contemplated by G.S. § 97-10.2(h), is preserved without the employer sacrificing the opportunity to contest liability under the Act. Moreover, protection against double recovery by the injured employee is afforded through the provisions for employer reimbursement. *See Andrews*, 55 N.C. App. at 131, 284 S.E.2d at 752. On the other hand, an injured employee may recover immediately from the third-party and without a delay caused by the pending resolution of the workers' compensation claim, thereby accomplishing "swift and

RAHIM v. TRUCK AIR OF THE CAROLINAS

[123 N.C. App. 609 (1996)]

sure compensation to injured workers.” *Rorie*, 306 N.C. at 709, 295 S.E.2d at 460. In sum, this interpretation produces a

fair [outcome to] everyone concerned: the employer . . . comes out even; the third [party] pays exactly the damages he would normally pay, . . . and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone.

See 2A Larson § 71.20.

We therefore hold the General Assembly intended G.S. § 97-10.2(f) to mandate reimbursement of defendants in the case *sub judice*, and the Commission thus erred in determining defendants possessed no lien interest in sums received by plaintiff through settlement with the third-party tortfeasor prior to resolution of the instant workers’ compensation claim. Although the Settlement Stipulation between the parties properly served as defendants’ written consent to the settlement between plaintiff and the third-party tortfeasors, it created no rights other than those already existing under G.S. § 97-10.2.

For the reasons stated herein, the Order and Award of the Full Commission is reversed, and this matter remanded for further proceedings consistent with this opinion.

Reversed.

Judges LEWIS and WYNN concur.

MUNAZZA T. RAHIM, D/B/A TAB ORIENTAL RUGS, PLAINTIFF v. TRUCK AIR OF THE CAROLINAS, INC., DEFENDANT

No. COA95-146

(Filed 20 August 1996)

**Carriers § 122 (NCI4th)— claim against interstate carrier—
Carmack Amendment applicable—failure to make timely
claim on carrier**

Plaintiff’s claim to recover the value of rugs allegedly stolen from defendant common carrier’s warehouse was properly dis-

RAHIM v. TRUCK AIR OF THE CAROLINAS

[123 N.C. App. 609 (1996)]

missed even if plaintiff stated a claim under the Carmack Amendment to the Interstate Commerce Act, which preempts all state claims for shipments over which the ICC has jurisdiction, where plaintiff did not answer defendant's requests for admissions, which included an admission that plaintiff did not make a timely claim on defendant pursuant to the Carmack Amendment and as agreed between the parties under defendant's waybill, and the requested admissions were thus deemed admitted.

Am Jur 2d, Carriers §§ 538, 539, 578-580, 582, 588, 614.

Appeal by plaintiff from judgment entered 9 November 1994 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 27 October 1995.

Tate Law Offices, by C. Richard Tate, Jr. and Maxine D. Kennedy for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Bradley R. Kutrow and Scott Boatwright, for defendant-appellee.

JOHN, Judge.

Plaintiff assigns error to the trial court's entry of summary judgment in favor of defendant. We find plaintiff's arguments unpersuasive.

Pertinent facts and procedural information are as follows: Plaintiff purchased twenty (20) rugs from Persian Oriental Rugs of Lahore, Pakistan, which were shipped 11 March 1990 by KLM Cargo pursuant to waybill no. 07487116993. On 12 April 1990, the rugs arrived in Atlanta, Georgia, were placed with defendant for delivery, were divided into two lots of three bales each and assigned waybill nos. 410641 and 410647.

On 18 April 1990, defendant assigned new waybill no. 407311 to the rugs, and then transported them to plaintiff's warehouse in High Point. However, plaintiff claimed two rugs were missing and refused delivery. Defendant's driver thereupon returned the items to defendant's Greensboro warehouse.

On 23 April 1990, defendant informed plaintiff the Greensboro warehouse had been burglarized the previous weekend, that fifteen of

RAHIM v. TRUCK AIR OF THE CAROLINAS

[123 N.C. App. 609 (1996)]

plaintiff's twenty rugs were missing, and that a police report had consequently been filed. The remaining five rugs were delivered to plaintiff 27 April 1990. According to plaintiff's "Statement of Facts" contained in its appellate brief, "on 2 May 1990 [plaintiff] filed a claim, in the form of a letter, with KLM Cargo and [defendant] for the missing fifteen (15) rugs."

Plaintiff filed the instant action 13 April 1993, alleging in pertinent part as follows:

3. Plaintiff purchased twenty (20) rugs from Persian Oriental Rugs of Pakistan. She is informed and believes that said rugs were delivered to KLM Cargo, KLM Royal Dutch Airlines in Labore, Pakistan and were flown to Atlanta, Georgia and delivered to the defendant for delivery to the plaintiff.

4. On 27 April 1990 the defendant delivered five (5) of the twenty rugs to the plaintiff's business at 118 South Main Street in High Point, North Carolina.

5. As a direct and proximate result of the defendant's failure to deliver the bailed fifteen (15) rugs, plaintiff has been damaged in the sum of \$24,513.32, [plus interest and costs].

Defendant timely answered, denying liability, and on 11 February 1994 served on plaintiff, *inter alia*, a Request for Admissions. Although plaintiff obtained an extension of time (until 15 April 1994) to respond, no answers were forthcoming. On 24 June 1994, defendant moved for summary judgment based upon the pleadings and "the Request for Admissions served February 11, 1994 which are deemed admitted based on the plaintiff's failure to answer them." Defendant asserted two grounds for its motion: (1) "[t]he Carmack Amendment, 49 U.S.C. § 11707, preempts all state and common law claims of breach of contract and negligence for goods lost or damaged by a common carrier during interstate shipment," and "plaintiff's complaint . . . asserts only state law claims;" and (2) "plaintiff has . . . admitted his [sic] failure to abide by a condition precedent to recovery against the defendant."

Following a hearing, the trial court allowed defendant's motion and dismissed plaintiff's complaint with prejudice. Plaintiff appeals.

RAHIM v. TRUCK AIR OF THE CAROLINAS

[123 N.C. App. 609 (1996)]

The sole issue on appeal is whether defendant's motion for summary judgment was properly granted. We affirm the action of the trial court.

Summary judgment is appropriate if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The burden is upon the party moving for summary judgment to show that no triable issue of fact exists, *Varner v. Bryan*, 113 N.C. App. 697, 700, 440 S.E.2d 295, 298 (1994), which burden may be met by showing that the opposing party's claim is barred by an affirmative defense which cannot be overcome. *Id.* at 701, 440 S.E.2d at 298.

Defendant first contends the trial court's entry of summary judgment was proper because plaintiff failed to sue defendant "under 49 U.S.C. § 11707, [but] instead asserted a state law bailment claim," and "the Carmack Amendment preempts all state law claims for shipments over which the Interstate Commerce Commission has jurisdiction." While we sustain defendant's latter assertion, we find it unnecessary to discuss the former in detail.

The Carmack Amendment (Carmack), enacted in 1906 as an amendment to the Interstate Commerce Act of 1887, "addresses the liability of common carriers for goods lost or damaged during a shipment over which the Interstate Commerce Commission has jurisdiction." *Shao v. Link Cargo (Taiwan) Limited*, 986 F.2d 700, 704 (4th Cir. 1993). Originally codified at 49 U.S.C. § 20(11), Carmack has since been recodified primarily at 49 U.S.C. § 11707, and provides in relevant part as follows:

A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall issue a receipt or bill of lading for property it receives for transportation That carrier . . . [is] liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States

49 U.S.C. § 11707(a)(1) (19XX).

RAHIM v. TRUCK AIR OF THE CAROLINAS

[123 N.C. App. 609 (1996)]

Although neither the United States Supreme Court nor our North Carolina courts have considered the specific issue of whether Carmack preempts state common law claims against carriers, each of the federal circuit courts which have addressed the question have concluded the federal amendment indeed preempts state law actions. In *Shao*, for example, plaintiff-shipper's common law negligence and breach of contract claims were determined to be "preempted by the Carmack Amendment" in that "[t]he United States Supreme Court has long interpreted the Carmack Amendment as manifesting Congress' intent to create a national scheme of carrier liability for goods damaged or lost during interstate shipment under a valid bill of lading." *Shao*, 986 F.2d at 704 (citing *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06, 57 L.Ed. 314, 320 (1913) ("there can be no rational doubt that Congress intended to take possession of the subject [liability carriers] and supersede all state regulation with reference to it")). See also *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672, 677 (1st Cir. 1987) ("[t]he Carmack Amendment provides the exclusive remedy," for "an action for damages against the delivering carrier"); *Hughes Aircraft Co. v. North American Van Lines Inc.*, 970 F.2d 609, 613 (9th Cir. 1992); *Underwriters at Lloyds of London v. North American Van Lines*, 890 F.2d 1112, 1121 (10th Cir. 1989); *Hughes v. United Van Lines Inc.*, 829 F.2d 1407, 1415 (7th Cir. 1987); *Air Products & Chemicals, Inc. v. Illinois Central Gulf R.R. Co.*, 721 F.2d 483, 487 (5th Cir. 1983), *cert. denied*, 469 U.S. 832, 83 L.Ed.2d 64 (1984); *W.D. Lawson & Co. v. Penn Central Co.*, 456 F.2d 419, 421 (6th Cir. 1972).

We find the foregoing authorities persuasive and likewise hold Carmack to provide the exclusive remedy for claims against carriers subject to the Interstate Commerce Commission [ICC]. *Accord Zarn, Inc. v. Southern Railway Co.*, 50 N.C. App. 372, 374, 274 S.E.2d 251, 254 (1981) ("As a common carrier engaged in interstate commerce, defendant's liability for damage to cargo is governed by the Carmack Amendment . . .").

In the case *sub judice*, it is undisputed that defendant qualified as "[a] common carrier providing transportation for services subject to the jurisdiction of the Interstate Commerce Commission," 49 U.S.C. § 11707(a)(1), and that it issued a separate bill of lading covering the domestic segment of the shipment for plaintiff's property received for transportation. *Id.* See also *Shao*, 986 F.2d at 703 (jurisdiction of ICC extends only to shipments from foreign countries to the United States where shipment is covered by a separate domestic bill of lading).

RAHIM v. TRUCK AIR OF THE CAROLINAS

[123 N.C. App. 609 (1996)]

Accordingly, any claims against defendant for “actual loss or injury to [plaintiff’s] property,” 49 U.S.C. § 11707(a)(1), would be governed exclusively by Carmack.

Notwithstanding, defendant asserts plaintiff failed to properly assert a claim under Carmack and has instead alleged “a state law bailment claim.” While it appears plaintiff’s pleading may be sufficient, *see Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138, 12 L.Ed.2d 194, 198 (1964) (Carmack plaintiff must allege: (1) receipt of the goods by the defendant carrier in good order and condition; (2) the shipment’s arrival at its destination in a damaged condition or its failure to arrive at all; and (3) the amount of the loss), it is unnecessary to discuss this issue in detail.

Assuming *arguendo* plaintiff has adequately pled its claim under Carmack, we are in any event persuaded by defendant’s argument that summary judgment was properly granted based on plaintiff’s admitted failure to satisfy a condition precedent to recovery. Title 49 U.S.C. § 11707(e) states that:

A carrier or freight forwarder may not provide by rule, contract, or otherwise, a period of less than 9 months [270 days] for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section.

It is undisputed that defendant’s Requests for Admissions remained unanswered more than six months following the date of filing, and more than four months subsequent to the extension deadline. Pursuant to N.C.R. Civ. P. 36(a), therefore, the following relevant matters for which admissions were requested were deemed admitted by plaintiff:

10. The reverse side of Truck Air waybill nos. 410641, 410647 and 407311 contains the following language:

Formal claims must be filed with the carrier within 270 (total) days after delivery date. Failure to file formal claim within the limitations (time) noted will result in declination of the claim.

11. Truck Air’s limitation on time to file formal claims is consistent with 49 U.S.C. § 11707(e).

12. You [plaintiff] filed no formal claim with Truck Air until more than 270 days had passed since delivery date.

RAHIM v. TRUCK AIR OF THE CAROLINAS

[123 N.C. App. 609 (1996)]

We must therefore reject plaintiff's belated assertion, contained in a document denominated "Plaintiff's Response to Defendant's Request for Admissions" ("Response") and served on defendant 30 August 1994, that it submitted a timely claim for damages "by letter to KLM and Truck Air dated 2 May 1990." Pursuant to N.C.R. Civ. P. 36(a), plaintiff's failure to answer within the allowed time period established it had submitted no formal claim to defendant within the 270 days permitted by Carmack and required by defendant's waybill.

As this Court held in *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 394 S.E.2d 698 (1990), "Rule 36 . . . means 'precisely what it says,' " *i.e.*, "[i]n order to avoid having requests for admissions deemed admitted, a party must respond within the period of the rule if there is any objection whatsoever to the request." Otherwise, failure to so respond dictates that the facts in question are "judicially established." *Id.* at 162, 394 S.E.2d at 701.

Further, save for the flagrantly delinquent service of plaintiff's "Response," the record reflects no attempt under Rule 36(b) by plaintiff to alter "judicial establishment," *see id.*, of its failure to file a claim within the allotted time limitation. *See Rhoads v. Bryant*, 56 N.C. App. 635, 637, 289 S.E.2d 637, 639, *disc. rev. denied*, 306 N.C. 386, 294 S.E.2d 211 (1982) (according to N.C.R. Civ. P. 36(b), " 'Any matter admitted under [Rule 36] is conclusively established unless the court on motion permits withdrawal or amendment of the admission' " (emphasis added)).

Moreover, we observe the only support in the record for plaintiff's assertion in its brief that it filed a claim by letter on 2 May 1994 is the corresponding statement in the tardy "Response." This in any event does not qualify as evidence of a "formal claim" sufficient to satisfy the minimum requirements for submission of claims against carriers regulated by the ICC. *See* 49 CFR § 1005.2(b).

Plaintiff's failure to submit a timely claim pursuant to Carmack, and as agreed between the parties pursuant to defendant's waybill, precludes plaintiff's suit seeking recovery of damages for loss of the rugs. Defendant thus established it was entitled to "judgment as a matter of law," G.S. § 1A-1, Rule 56(c), and accordingly, the trial court did not err in its entry of summary judgment in favor of defendant.

Affirmed.

Judges LEWIS and WYNN concur.

CROSS v. RESIDENTIAL SUPPORT SERVICES

[123 N.C. App. 616 (1996)]

SHIRLEY CROSS AND CHARLES A. CROSS, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF BARRY ELLIS CROSS, AND JANETTE GRIFFIN, PLAINTIFFS V. RESIDENTIAL SUPPORT SERVICES, INC., ROBERT HAMILTON RHODES, JR., AND MECKLENBURG COUNTY, DEFENDANTS

No. COA95-705

(Filed 20 August 1996)

1. Municipal Corporations § 444 (NCI4th)— purchase of insurance by area authority—no waiver of immunity by county

Purchase of insurance by RSS, as required by the Mecklenburg County Area Mental Health, Developmental Disabilities, and Substance Abuse Authority, did not constitute waiver of governmental immunity by defendant county, since area authorities are separate local political divisions, and different statutes provide for waiver of immunity by each. N.C.G.S. § 122C-152(a); N.C.G.S. § 153A-435(a).

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37 et seq.

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

2. Municipal Corporations § 445 (NCI4th)— participation in local governmental risk pool—total waiver of immunity

The trial court erred in ruling that defendant county had immunity for claims in the amount of \$1,000,000 or less, since the county's participation in a local governmental risk pool operated as a total waiver of governmental immunity in regard to plaintiff's claim.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 39.

CROSS v. RESIDENTIAL SUPPORT SERVICES

[123 N.C. App. 616 (1996)]

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Appeal by plaintiffs and cross-appeal by defendant Mecklenburg County from order entered 19 April 1995 by Judge Hollis M. Owens, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 March 1996.

Devore & Acton, P.A., by Fred W. DeVore, III, for plaintiffs.

Ruff, Bond, Cobb, Wade & McNair, L.L.P., by James O. Cobb, for defendant Mecklenburg County.

LEWIS, Judge.

In this action, plaintiffs appeal the trial court's decision that defendant County of Mecklenburg (County) has governmental immunity for its claims in the amount of one million dollars (\$1,000,000) or less.

On 10 June 1992, Barry Ellis Cross, a mentally disabled adult, was killed when he left a County van and was hit by a car driven by defendant Robert Hamilton Rhodes, Jr. as he tried to cross the street. At the time of the accident, the County had primary and excess policies that together provided coverage for bodily injury and property damage claims in excess of a self-insured retention of one million dollars (\$1,000,000) per occurrence. In addition, on 30 March 1988, the County, the City of Charlotte, and the Charlotte-Mecklenburg Board of Education entered into an Insurance and Risk Management Joint Undertaking Agreement (the Joint Agreement) for management of risks. The Joint Agreement incorporates by reference a Trust Agreement executed on 1 July 1987. Under these agreements, all three participants benefit from a two-tiered self-insurance program ("risk management program"). The risk management program is managed by the Division of Insurance and Risk Management (DIRM) of

CROSS v. RESIDENTIAL SUPPORT SERVICES

[123 N.C. App. 616 (1996)]

the City's Finance Department. Under the first tier, each participant makes contributions but itself retains the first \$500,000 per occurrence of losses. DIRM holds and invests each participant's first tier contributions; however, the funds invested are owned by the contributing participant. The second tier consists of the Tier 2 Reserve Fund which is funded jointly by all participants. Funds from this tier are available to each participant to cover losses in excess of \$500,000 per occurrence but not exceeding one million dollars (\$1,000,000) per occurrence.

On 15 October 1993, plaintiffs filed a civil action for negligence against defendants for actions which allegedly resulted in the death of Mr. Cross. After the complaint was amended and responsive pleadings were filed, on 23 January 1995, the County filed a motion to dismiss for lack of subject matter jurisdiction, or in the alternative, for partial summary judgment on plaintiffs' claims based on governmental immunity. On 19 April 1995, Judge Hollis M. Owens denied the County's motion to dismiss but granted partial summary judgment for the County holding that it had governmental immunity for plaintiffs' claims in the amount of one million dollars (\$1,000,000) or less. On 10 May 1995, plaintiffs appealed the grant of partial summary judgment. On 17 May 1995, the County cross-appealed the denial of the motion to dismiss.

A preliminary matter must be addressed. In its brief, the County asks this Court to dismiss plaintiffs' appeal. Since the County has not made this request in a motion pursuant to N.C.R. App. P. 37, we decline to consider its request. *See Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988).

[1] We first consider plaintiffs' assertion that the County has waived immunity because the Mecklenburg County Area Mental Health, Developmental Disabilities, and Substance Abuse Authority (Area Authority) required its service provider, Residential Support Services, Inc. (RSS), to purchase insurance. We are not persuaded.

Plaintiffs' assertion is based on a contract for developmental disabilities services, including services provided to Barry Cross. This contract was executed by Mecklenburg Group Homes, Inc. (now RSS) and the Area Authority, an entity which plaintiff asserts acts as an agent of the County. In this contract, the Area Authority required RSS to take out insurance in an amount not less than \$500,000. As required, RSS did purchase such insurance.

CROSS v. RESIDENTIAL SUPPORT SERVICES

[123 N.C. App. 616 (1996)]

Plaintiffs cite N.C. Gen. Stat. section 122C-152. This statute provides, in pertinent part:

(a) An area authority, by securing liability insurance as provided in this section, may waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent, employee, or board member of the area authority when acting within the scope of his authority or within the course of his duties or employment. Governmental immunity is waived by the act of obtaining this insurance, but it is waived only to the extent that the area authority is indemnified by insurance for the negligence or tort.

G.S. § 122C-152(a) (1993).

Assuming *arguendo* that the Area Authority's requirement, in the contract, that RSS purchase insurance, is a waiver of immunity by the Authority under this provision, it does not necessarily follow that the County has thereby waived immunity. G.S. section 122C-152 deals with a waiver of immunity by an area authority, not by a County. Under the statute, it is the Area Authority, not the County, that is indemnified by a decision to purchase insurance. See G.S. § 122C-152(b) (1993) (stating that the contract of insurance shall insure the area authority and its board members).

Under N.C. Gen. Stat. section 122C-116(1993), an area authority is "a local political subdivision of the State except that a single county area authority is considered a department of the county in which it is located for the purposes of Chapter 159 of the General Statutes." Chapter 159 deals with local government finance. See N.C. Gen. Stat. § 159-1(a) (1994). Area authorities are separate local political divisions in regard to the powers and duties of area authorities as enumerated in N.C. Gen. Stat. section 122C-117(1993), including the provision of services to clients like Barry Cross. Waiver of immunity by a county is provided for in N.C. Gen. Stat. section 153A-435(a) (1991). Given these statutory distinctions between counties and area authorities and the waiver provisions of G.S. section 122C-152, we hold that purchase by RSS of insurance, as required by the Area Authority, does not constitute a waiver of immunity by the County.

[2] Plaintiffs also assert that the County has waived governmental immunity by participation in a local governmental risk pool. The County does not contest that it has insurance coverage for claims

CROSS v. RESIDENTIAL SUPPORT SERVICES

[123 N.C. App. 616 (1996)]

over one million dollars. The County also concedes that our recent decision, *Lyles v. City of Charlotte*, 120 N.C. App. 96, 461 S.E.2d 347, *disc. review allowed*, 342 N.C. 414, 465 S.E.2d 542 (1995), establishes that it has waived governmental immunity for claims in excess of \$500,000 by its participation in a local governmental risk pool. The County contends, however, that *Lyles* does not resolve the question of whether it retains immunity for claims of \$500,000 or less.

In *Lyles*, we analyzed the same risk management program at issue in this appeal and held that the City of Charlotte had waived its right to assert governmental immunity by participating in this program which we held constituted a local government risk pool under N.C. Gen. Stat. section 160A-485(a) (1994) and N.C. Gen. Stat. section 58-23-5(1994). G.S. section 160A-485(a), provides, in pertinent part:

(a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General State Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability

G.S. § 160A-485(a) (1994).

A similar statute, N.C. Gen. Stat. section 153A-435(1991), governs waiver of immunity by a county. This statute provides, in pertinent part:

(a) A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment

Purchase of insurance pursuant to this subsection waives the county's governmental immunity, *to the extent of insurance coverage*, for any act or omission occurring in the exercise of a governmental function. *Participation in a local government risk pool pursuant to Article 39 [sic] [Article 23] of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section*

CROSS v. RESIDENTIAL SUPPORT SERVICES

[123 N.C. App. 616 (1996)]

(b) . . . *To the extent of the coverage of insurance purchased pursuant to subsection (a) of this section, governmental immunity may not be a defense to the action [authorized by this subsection]. . . .*

G.S. § 153A-435 (1991) (emphasis added).

Citing *Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995), the County asserts that, pursuant to the “to the extent of the coverage of insurance” language in this statute, it has waived immunity only “to the extent” that plaintiffs’ claim exceeds \$500,000 because it contends that it is covered under the risk management program only for claims above that amount. In *Jones*, we applied a partial waiver approach where we held that a city had not waived immunity for damages of \$250,000 or less because its excess insurance coverage was subject to a \$250,000 retention per incident. *Id.* at 303, 462 S.E.2d at 246.

In *Lyles*, we rejected a similar argument by the City of Charlotte. The City sought to minimize the risk-sharing character of this risk management program by insisting that it never exercised the option to borrow money from the Tier 2 funds. *Lyles*, 120 N.C. App. at 105, 461 S.E.2d at 353. In response, we held that the City had waived immunity by participation in a local governmental risk pool and concluded that “the City’s failure to exercise the option of using Tier 2 funds does not detract from the nature of the Tier 2 pool itself and is immaterial for purposes of characterizing the City’s arrangement.” *Id.* at 106, 461 S.E.2d at 353. In so upholding the trial court’s denial of summary judgment, we, in effect, held that the City’s participation in this risk management program operated as a total, not a partial, waiver of immunity. *See id.*

Our examination, in this appeal, of the components of this risk management program further compels the conclusion that participation in this program constitutes a total waiver of immunity. The Joint Agreement describes the program as follows: At the Tier 1 level (\$500,000 or under), each participant finances its own loss exposure by contributing funds annually which are held and invested by DIRM for that participant. A participant owns the Tier 1 funds it contributes. At the end of each fiscal year, the Tier 1 investment income and amounts remaining are placed into the participants’ individual accounts.

CROSS v. RESIDENTIAL SUPPORT SERVICES

[123 N.C. App. 616 (1996)]

At the Tier 2 level, each participant annually contributes a predetermined amount into the Tier 2 Reserve Fund from which losses in excess of the Tier 1 level (\$500,000) may be paid. All monies in this fund are available to any participant "to pay claims where the amount of liability is in excess of that party's Tier 1 funds and the amount in its Tier 2 account." The funds of each party are separately accounted for within the Tier 2 Reserve Fund and the interest earnings for a participant's portion of the assets in the Fund are attributed to its separate account.

Each participant must raise and thereafter maintain a target amount in the Reserve Fund. If a participant has claims paid out of the Reserve Fund and taken from the account of another participant, that participant must repay the funds paid plus interest. Furthermore, if all of a participant's Tier 1 funds are expended to pay claims prior to the end of a given fiscal year, DIRM may obtain funds from the Tier 2 Reserve Fund to pay Tier 1 claims, subject to certain limitations and conditions set out in the Trust Agreement.

As we emphasized in *Lyles*, this risk management program is, fundamentally, a device that permits the participants to share risks. Granted, Tier 2 reserve funds ordinarily are not disbursed to pay claims at the Tier 1 level, *i.e.*, claims of \$500,000 or less. However, such disbursement could occur if the County's Tier 1 funds are expended to pay claims prior to the end of a given fiscal year.

We conclude that the trial court erred by ruling that the County has immunity for amounts of \$1,000,000 or less. In accordance with *Lyles*, we hold that the County's participation in this risk management program operates as a total waiver of governmental immunity in regard to plaintiff's claims.

The County cross-appeals on the issue of whether the trial court erred by denying its motion to dismiss plaintiff's claims for lack of subject matter jurisdiction. A trial court's denial of a motion to dismiss for lack of subject matter jurisdiction is an interlocutory order and, as such, is not immediately appealable. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982) (citing *Shaver v. Construction Co.*, 54 N.C. App. 486, 283 S.E.2d 526 (1981)). An appeal from a nonappealable interlocutory order should be dismissed. *Veazey v. City of Durham*, 231 N.C. 357, 362, 364, 57 S.E.2d 377, 382, 383 (1950); *see also Shaver*, 54 N.C. App. at 488, 283 S.E.2d at 527.

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 623 (1996)]

The trial court order granting the County's motion for summary judgment on the grounds that the County has governmental immunity for claims up to one million dollars is reversed and remanded. The County's cross-appeal is dismissed.

Judges GREENE and SMITH concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; AND CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPLICANT, APPELLEES V. PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR, APPELLANT

No. COA95-609

(Filed 20 August 1996)

Utilities §§ 11, 51 (NCI4th)—pronouncement of policy in adjudicative proceeding—discretionary matter—specific policy—no abuse of discretion

The Utilities Commission did not exceed its statutory authority by the pronouncement of a policy in an adjudicative proceeding, since the Commission is specifically authorized by statute, N.C.G.S. § 62-23, to exercise in its discretion rulemaking functions within the course of its “functions judicial in nature”; furthermore, the Commission did not abuse its discretion in declaring, in the course of adjudicating a particular case, as policy that 100% of the gain or loss on the sale of water/sewer utility systems should be assigned to the utility company shareholders.

Am Jur 2d, Public Utilities §§ 230, 232.

Appeal by intervenor-appellant from orders entered 3 February 1995, 14 March 1995, and 12 April 1995 by the North Carolina Utilities Commission. Heard in the Court of Appeals 27 February 1996.

Hunton & Williams, by Edward S. Finley, Jr., and James L. Hunt, for applicant-appellee Carolina Water Service, Inc. of North Carolina.

Public Staff, Antoinette R. Wike, Chief Counsel, and Paul L. Lassiter, Staff Attorney, for intervenor-appellant Public Staff—North Carolina Utilities Commission.

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 623 (1996)]

JOHN, Judge.

Carolina Water Service, Inc. of North Carolina (CWS) filed an application with the North Carolina Utilities Commission (the Commission) 29 December 1994 requesting permission to relinquish its certificate to serve Mallard Crossing subdivision in Mecklenburg County and to sell that water and sewer system to the City of Charlotte. CWS further requested that its shareholders retain 100 percent of the capital gain on such sale, consistent with the policy articulated by the Commission in Docket No. W-354, Subs 133 and 134 (the policy), that

in future proceedings, the Commission will follow a policy, absent overwhelming and compelling evidence to the contrary, of assigning 100 % of the gain or loss on the sale of water and/or sewer utility systems to utility company shareholders. . . . Such policy serves the public interest by promoting efficiencies through economies of scale and generally results in more favorable rates and an enhanced quality of service.

On 23 January 1995, Public Staff recommended to the Commission that it approve the transfer, but requested deferral of a ruling on distribution of the gain on sale until this Court resolved Public Staff's pending challenge to the Commission's ruling in Docket No. W-354, Subs 133 and 134. By order dated 3 February 1995, the Commission authorized transfer of the system, denied Public Staff's request to defer ruling, and awarded 100 percent of the gain on sale to the shareholders of CWS. The Commission concluded:

[t]he Public Staff alleges no "overwhelming and compelling evidence" in this proceeding to convince the Commission to depart and deviate from the policy announced in the Order entered in Docket No[. W-354, Subs 133 and 134 on September 7, 1994, to henceforth assign 100 percent of the gain or loss on the sale of water and/or sewer systems to utility shareholders.

The order further required CWS to file a report within 20 days showing calculation of the gain and related bookkeeping entries.

On 13 February 1995, CWS moved for additional time to file its report. Public Staff filed a response 17 February 1995 again requesting that the Commission

issue an Order deferring its determination of the regulatory treatment to be afforded to the gain on CWS's sale of its Mallard

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 623 (1996)]

Crossing system until after the North Carolina Court of Appeals rules on the Public Staff's appeal in Docket No[.]. 354, Subs 133 and 134.

By order dated 14 March 1995, the Commission granted CWS's request for additional time, but once more denied Public Staff's request for deferral.

On 15 March 1995, Public Staff moved for an evidentiary hearing. The Commission denied the motion 12 April 1995, concluding Public Staff had failed to make a timely request for hearing when the matter was initially presented to the Commission, and thus had "waived its right to request such a hearing."

In *State ex rel. Utilities Commission v. Public Staff*, 123 N.C. App. 43, 46, 472 S.E.2d 193, 196 (1996) (No. COA95-27, filed 2 July 1996), this Court rejected arguments by Public Staff that the policy set out in Docket No. 354, Subs 133 and 134 was arbitrary and capricious, and unsupported by competent, substantial, and material evidence. However, Public Staff's challenge to future applicability of the policy was determined to be "prospective in nature" and thus not properly before the Court as it "had no bearing upon this case" and was "not ripe for determination." *Id.* at 51, 472 S.E.2d at 199.

From the Commission's orders dated 3 February 1995, 14 March 1995, and 12 April 1995, Public Staff appeals.

Public Staff attacks the Commission's reliance in the instant case upon the policy, contending that through its enactment, the Commission exceeded its statutory authority by unlawfully engaging in legislative rulemaking through *ad hoc* adjudication. We disagree.

By enactment of Chapter 62, our General Assembly has conferred upon the Commission

broad powers to regulate public utilities and to compel their operation in accordance with the policy of the State, as declared in G.S. 62-2.

State ex rel. Utilities Comm. v. Mackie, 79 N.C. App. 19, 32, 338 S.E.2d 888, 897 (1986) (citation omitted). *See also State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. 541, 545, 299 S.E.2d 763, 765 (1983) (pursuant to N.C. Gen. Stat. §62-30, "legislature has granted the Commission 'such general power and authority to supervise and control public utilities of the State as may be neces-

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 623 (1996)]

sary. . . .”). In Chapter 62, the Commission is declared to be an “administrative board or agency” and is empowered to employ “rule-making functions” as well as “functions judicial in nature” in the exercise of its legislatively designated responsibilities. N.C. Gen. Stat. § 62-23 (1989); *see also* N.C. Gen. Stat. § 62-31 (1989) (“Power to make and enforce rules”) and N.C. Gen. Stat. § 62-60 (1989) (Power to “act[] in a judicial capacity”). These functions have been distinguished as follows:

[A]djudication involves a specifically named party and a determination of particularized legal issues and facts with respect to that party. Rulemaking, by contrast, involves general categories or classes of parties and facts and policies of general applicability.

Daye, *North Carolina’s New Administrative Procedure Act: An Interpretative Analysis*, 53 N.C.L. Rev. 833, 868 (1975).

As an administrative agency, the Commission may establish rules through *ad hoc* rulemaking in an adjudicative proceeding as well as through general rulemaking proceedings. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 413, 269 S.E.2d 547, 569 (1980).

Accordingly,

[t]he scope of [judicial] review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern [citations omitted]. Our duty is at an end when it becomes evident that the Commission’s action is based upon substantial evidence and is consistent with the authority granted by [the legislature].

Id. (citing *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 207, 91 L. Ed. 1995, 2004-05 (1947)). *See also Public Staff* (COA95-27), 123 N.C. App. at —, 472 S.E.2d at 196 (role of this Court “is not and should not be . . . to determine the merits of policy positions adopted or rejected by the Commission”).

Having previously held in *Public Staff*, 123 N.C. App. at —, 472 S.E.2d at 196, that the policy was not “arbitrary and capricious” and that it was supported by “substantial evidence,” *see Rate Bureau*, 300 N.C. at 413, 269 S.E.2d at 569, we now consider Public Staff’s argument herein that pronouncement of the policy in an adjudicative proceeding was not “consistent with the authority granted [the Commission] by [the General Assembly].” *Id.*

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 623 (1996)]

G.S. § 62-23 provides, *inter alia*, that

[t]he Commission shall separate its . . . rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest.

G.S. § 62-23.

Hence the Commission is specifically authorized by statute to exercise *in its discretion* rule making functions within the course of its “functions judicial in nature.” *Id.* See also *Rate Bureau*, 300 N.C. at 413, 269 S.E.2d at 569 (citation omitted) (“choice . . . between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency”). The Commission thus acted in accordance with the discretionary authority accorded it by the General Assembly in the adjudication of Docket No. W-354, Subs 133 and 134 when it declared the policy would have prospective application to future proceedings. Public Staff’s argument that the Commission thereby exceeded its statutory authority is unfounded.

The sole question remaining is whether enactment of the policy by the Commission within an adjudicative proceeding constituted an abuse of discretion. Exercise of discretionary powers of the Commission will not be reversed by reviewing courts except upon a showing of “capricious, unreasonable, or arbitrary action or disregard of law.” *Utilities Commission v. Coach Co.*, 261 N.C. 384, 391, 134 S.E.2d 689, 695 (1964) (citation omitted). The arguments advanced by Public Staff in this regard are essentially identical to those found unpersuasive by this Court in *Public Staff* when considering whether the policy was arbitrary and capricious. As in *Public Staff*, we similarly conclude that declaration by the Commission of the policy in the course of adjudicating Docket No. W-354, Subs 133 and 134 was not an abuse of the Commission’s legislatively accorded discretion.

Public Staff also maintains the Commission unlawfully exceeded its statutory authority by “[d]enying all of the Public Staff’s requests for a trial-type hearing.” This argument cannot be sustained.

Public Staff does not dispute that it failed, at the initial hearing or even prior to the Commission’s final disposition of the matter, either to request a “trial-type hearing” or to allege *any* evidence, much less “overwhelming and compelling evidence,” in an effort to challenge the Commission’s reliance upon the policy as announced in Docket

STATE EX REL. UTILITIES COMM. v. PUBLIC STAFF

[123 N.C. App. 623 (1996)]

No. W-354, Subs 133 and 134. Public Staff instead elected to respond to CWS's request for 100 percent of the gain on sale herein by asserting a single recommendation—deferral of decision pending issuance of this Court's opinion regarding the policy. Not until 15 March 1995 did Public Staff ultimately move for an evidentiary hearing, this request coming seven weeks after it brought the instant matter before the Commission and six weeks following the Commission's 3 February 1995 dispositional order.

As Public Staff's request for a "trial-type hearing" of substantive arguments was not before the Commission prior to its 3 February 1995 order applying the policy established in Docket No. W-354, Subs 133 and 134, the Commission was under no duty to rule upon the necessity of, nor grant, a hearing prior to applying that policy. *See State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 745, 332 S.E.2d 397, 474, (1985) *rev'd on other grounds*, 476 U.S. 953, 90 L. Ed. 2d 943 (1986) (N.C.G.S. § 62-79 requires Commission to "consider and determine [only] *controverted* questions" (emphasis added)). Consequently, we hold the Commission correctly concluded Public Staff had "waived its right to request such a hearing," and reject Public Staff's remaining arguments which essentially rest upon the Commission's refusal to conduct an evidentiary hearing. *See Nantz v. Employment Security Comm.*, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477 (1976) ("[a] litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention. . . ."). The Commission therefore properly applied the policy in the case *sub judice* when it stated:

The Public Staff alleges no "overwhelming and compelling evidence" in this proceeding to convince the Commission to depart and deviate from the policy announced in the Order entered in Docket No[. W-354, Subs 133 and 134 on September 7, 1994, to henceforth assign 100 percent of the gain or loss on the sale of water and/or sewer systems to utility shareholders.

Affirmed.

Judges EAGLES and WALKER concur.

BECK v. BECK

[123 N.C. App. 629 (1996)]

RODNEY D. BECK, PLAINTIFF-APPELLEE v. CHRISTINE LYNN BECK,
DEFENDANT-APPELLANT

No. COA95-1199

(Filed 20 August 1996)

1. Divorce and Separation § 494 (NCI4th)— child born in North Carolina—father in Kentucky—North Carolina as home state—North Carolina court's refusal to exercise jurisdiction—error

Where one of the parties' children was born in North Carolina and resided here with his mother, North Carolina was the "home state"; Kentucky, the state in which plaintiff filed his divorce petition, did not have jurisdiction to enter the initial custody decree with respect to that child and the parties were therefore not bound by it; and the trial court erred in refusing to assume jurisdiction of defendant's action to modify the custody order with respect to that child. N.C.G.S. § 50A-3(1).

Am Jur 2d, Divorce and Separation §§ 963, 964.

What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA). 78 ALR4th 1028.

Significant connection jurisdiction of court under sec. 3(a) (2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS sec. 1738A(c)(2)(B). 5 ALR5th 550.

Home state jurisdiction of court under sec. 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS sec. 1738A(c)(2)(A). 6 ALR5th 1.

2. Divorce and Separation § 513 (NCI4th)— Kentucky as child's home state—continuing jurisdiction—no jurisdiction in North Carolina

The trial court acted properly by declining to assume jurisdiction to adjudicate custody issues regarding the parties' older child, since the child had lived with his parents in Kentucky for at least six consecutive months and Kentucky was his "home state"; Kentucky properly assumed jurisdiction when it entered its initial

BECK v. BECK

[123 N.C. App. 629 (1996)]

order; Kentucky had continuing jurisdiction to adjudicate child custody issues with respect to that child, and North Carolina could not modify the Kentucky order as long as plaintiff father continued to reside there or unless Kentucky declined to exercise its jurisdiction; and there was no indication that Kentucky declined to exercise its jurisdiction. N.C.G.S. § 50A-14(a).

Am Jur 2d, Divorce and Separation §§ 963, 964, 1004, 1143-1147.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS sec. 1738A. 83 ALR4th 742.

Significant connection jurisdiction of court under sec. 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS sec. 1738A(c)(2)(B). 5 ALR5th 550.

Pending proceeding in another state as ground for declining jurisdiction under sec. 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS sec. 1738A(g). 20 ALR5th 700.

Appeal by defendant from order entered 26 June 1995 by Judge Wendy Enochs in Guilford County District Court. Heard in the Court of Appeals 6 June 1996.

The Law Offices of William B. Mills, by Richard J. McCain and John A. Hauser, for plaintiff-appellee.

Karen K. Fisher and James C. Lee for defendant-appellant.

WALKER, Judge.

The parties were married on 13 August 1990 and had two children, Kyle Andrew Beck, born 29 October 1991, and Tyler Aaron Beck, born 6 October 1993. The parties moved to Kentucky in September 1992. On 30 September 1993, defendant moved to North Carolina with her son, Kyle. On 11 January 1994, the parties entered into a separation agreement which granted plaintiff "reasonable and liberal visitation" with the children but did not provide a schedule for

BECK v. BECK

[123 N.C. App. 629 (1996)]

such visitation. A divorce decree was entered in Kentucky incorporating the parties' separation agreement on 31 March 1994.

Following incorporation of the parties' agreement, the plaintiff was unable to schedule visitation with his children. Therefore, plaintiff made a motion to modify the custody order to include a specific schedule for visitation. On 7 February 1995, an order was entered granting plaintiff specific times for visitation, including one week in the spring. Thereafter, defendant continued to deny plaintiff visitation with their children and filed this action in Guilford County District Court to change jurisdiction and modify the Kentucky order. Pursuant to this action, defendant raised for the first time the issue of plaintiff's fitness.

The trial court made the following relevant conclusions:

Conclusions of Law

(1) The Hardin County District Court for Hardin County Kentucky has jurisdiction over the parties and subject matter of this action.

(2) It would be improper for this court, in this circumstance, to assume jurisdiction to adjudicate issues of child custody, visitation, and support when the State of Kentucky has properly done so. . . .

From the trial court's order declining to assume jurisdiction and dismissing her motion to modify custody, defendant appeals.

The issue of a state's jurisdiction over child custody matters is governed by the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (1980), and the Uniform Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. § 50A (1989). See K.R.S. 403.400-620 (1980). "The PKPA establishes national policy in the area of custody jurisdiction." *Gasser v. Sperry*, 93 N.C. App. 72, 74, 376 S.E.2d 478, 480 (1989). To the extent that any state custody statute conflicts with the PKPA, the federal act controls. *Id.*

On appeal defendant contends the trial court erred by finding that Kentucky properly assumed jurisdiction. Under the UCCJA, a state has jurisdiction to enter an initial or modified custody decree if:

(1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding

BECK v. BECK

[123 N.C. App. 629 (1996)]

and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

N.C. Gen. Stat. § 50A-3 (1989); *See* K.R.S. 403.420 (1980).

The PKPA provides substantially the same jurisdictional prerequisites as the UCCJA. Similarly, the PKPA allows a state to assume jurisdiction to determine custody issues if such state is the child's "home state." 28 U.S.C. § 1738A (c)(2)(A). However, unlike the UCCJA, the PKPA prohibits states from assuming jurisdiction under the "best interest" or "significant connection" factor unless no state is the "home state." 28 U.S.C. § 1738A (c)(2)(B). The PKPA defines "home state" as:

the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. . . .

28 U.S.C. § 1738A (b)(4). This definition is substantially similar to "home state" as defined by the UCCJA. N.C. Gen. Stat. § 50A-2(5); *See* K.R.S. 403.410(5) (1980).

BECK v. BECK

[123 N.C. App. 629 (1996)]

[1] When plaintiff filed his divorce petition on 3 November 1993 requesting that Kentucky enter an order incorporating the parties' separation agreement, Tyler was less than six months old. Both the UCCJA and the PKPA provide that where a child is less than six months of age, the "home state" is the state in which the child lived from birth with any such persons. Since Tyler was born and resided here with his mother, North Carolina is the "home state." As such, Kentucky may not use the "best interest" or "significant connection" factor as a basis for assuming jurisdiction. Thus, Kentucky did not have jurisdiction to enter the initial custody decree with respect to Tyler and the parties are therefore not bound by it. *See* K.R.S. 403.510 (1980) (custody decrees bind parties only if Kentucky "had jurisdiction"). Accordingly, North Carolina is the "home state" of Tyler and the trial court erred in refusing to assume this jurisdiction.

[2] We next consider whether Kentucky properly assumed jurisdiction of the parties' oldest son, Kyle. The plaintiff filed his divorce petition and requested that the parties' separation agreement be incorporated on 3 November 1993. Prior to the commencement of the proceeding, Kyle had not lived in North Carolina for at least six consecutive months. Rather, Kyle lived with his parents in Kentucky from September 1992 until 23 September 1993, thereby making Kentucky his "home state." Accordingly, Kentucky properly assumed jurisdiction when it entered its initial order. As such, North Carolina must recognize and enforce Kentucky's order unless this State has the authority to modify said order. N.C. Gen. Stat. § 50A-13 (1989).

Modification of another state's custody decree is governed by N.C. Gen. Stat. § 50A-14(a) (1989) which provides:

(a) If a court of another state had made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Chapter or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

Defendant contends that the trial court erred in concluding that Kentucky has continuing jurisdiction to adjudicate matters of child custody.

The PKPA provides that "[t]he jurisdiction of a court of a State which has made a child custody determination consistently with the

BECK v. BECK

[123 N.C. App. 629 (1996)]

provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.” 28 U.S.C. § 1738A (d) (1980). Subsection (c)(1) requires that “such court has jurisdiction under the law of such State.” Since Kentucky would have jurisdiction of Kyle under the UCCJA, that state has continuing jurisdiction to adjudicate child custody issues with respect to Kyle, and North Carolina may not modify the Kentucky order as long as the father continues to reside in Kentucky. N.C. Gen. Stat. § 50A-14(a) (modification of custody decrees); *See Wilson v. Wilson*, 121 N.C. App. 292, 298, 465 S.E.2d 44, 47 (1996) (Judge Greene concurring) (continuing jurisdiction exists in the state entering initial order only if, at the time of the modification request, either parent or contestant remains in the state issuing the initial custody decree).

We note that should Kentucky decline to exercise its jurisdiction to adjudicate custody issues with respect to Kyle, North Carolina could subsequently assert its jurisdiction as the “home state” and modify the Kentucky order pursuant to N.C. Gen. Stat. § 50A-14(a). In determining whether to decline jurisdiction, Kentucky “may communicate with a court of . . . [this State] and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.” N.C. Gen. Stat. § 50A-7(d) (1989); *See K.R.S. 403.460(4)* (1980). However, there is nothing in the record to indicate that Kentucky declined to exercise its jurisdiction.

Accordingly, we find that the court acted properly by declining to assume jurisdiction to adjudicate custody issues regarding Kyle. However, for the reasons stated above, we reverse the court’s order in part and remand to the Guilford County District Court the issue of custody with respect to the parties’ youngest son, Tyler.

Affirmed in part, reversed in part and remanded.

Judges GREENE and MARTIN, JOHN C. concur.

BOGER v. GATTON

[123 N.C. App. 635 (1996)]

CARL DEAN BOGER AND WIFE, MARTHA S. BOGER, AND O. L. STROUD, AND WIFE,
PAULINE JOHNSON STROUD, PLAINTIFFS V. JOHN GATTON, JR. AND WIFE, MARY
ANN GATTON, DEFENDANTS

No. COA95-806

(Filed 20 August 1996)

**Easements §§ 32, 37 (NCI4th)— prescriptive easement—
permissive use—identity of easement—insufficiency of
evidence**

In an action for declaration of a prescriptive easement, the trial court erred in denying defendant's motion for JNOV where plaintiffs failed to rebut the presumption that use was permissive; there was thus insufficient evidence of adverse use to support the jury verdict; and plaintiffs' evidence of substantial identity was also insufficient to submit to the jury.

Am Jur 2d, Easements and Licenses §§ 45, 59.

**Acquisition of right of way by prescription as affected
by change of location or deviation during prescriptive
period. 80 ALR2d 1095.**

Appeal by defendant Mary Ann Gatton from order entered 28 December 1994 by Judge W. Steven Allen, Sr. in Iredell County Superior Court. Heard in the Court of Appeals 26 March 1996.

Franklin Smith for plaintiffs-appellees.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for defendant-appellant Mary Ann Gatton.

LEWIS, Judge.

In this appeal, defendant Mary Ann Gatton seeks to overturn a jury determination that plaintiffs have a prescriptive easement over her property.

Evidence of the following chain of events was presented at trial. Plaintiffs own a 112 acre farm that lies approximately one-half mile off of Highway 901 near Harmony in Iredell County. At the time this action was filed, defendants John Gatton, Jr. (now deceased) and his wife, Mary Ann Gatton, owned a five acre tract adjoining Highway 901 and other interior tracts that lie between the five acre tract and plaintiffs' farm. John Gatton, Jr. died on 27 July 1994, prior to trial.

BOGER v. GATTON

[123 N.C. App. 635 (1996)]

In 1945, James Edgar Johnson ("Ed Johnson"), plaintiffs' predecessor in title, built a farm road that led from the present 112 acre farm to Highway 901 and crossed the five acre tract now owned by defendant. At the time, Sollie Stroud owned the land over which this road was built, including the five acre tract now owned by defendant. Ed Johnson's son, James Edgar Johnson, Jr. testified at trial concerning a conversation that took place between his father and Sollie Stroud in 1945 concerning Ed's need for road access to his farm. James Johnson, Jr. testified that Sollie Stroud said to his father: "I'll just give you a road." It was shortly after this conversation that Ed Johnson built the farm road ("old road"). The old road was used by farm vehicles, Ed's car, and the milkman and was maintained by Ed. Ed died in 1976. On 30 August 1978, plaintiffs bought their interest in Ed's farm from the executors of his estate. Included in the conveyance were all right, title and interest of the grantors "in and to the easements, cartways and all means of ingress and egress to and from the above described property."

After plaintiffs acquired the farm, the Bogers began a dairy business. Incident to this business, heavy equipment, including 18 wheel trucks, began traversing the old road. The Bogers maintained the road by grading it and adding gravel. In 1989, John Gatton built a new 25 foot wide road ("new road") that connects the old farm road to Highway 901. Afterwards, in 1989 or 1990, he placed a cable across the old road bed near the junction with the new road. This cable prevented traffic from using about 400 feet of the old farm road. This was done in a manner that diverted traffic away from defendant's house forcing the traffic to use the new road to access Highway 901. At the time of trial, plaintiffs were using the new road with defendant's permission. However, they claim that their large trucks cannot negotiate a 90 degree angle in the new road and that they are thereby prevented from accessing Highway 901.

On 27 September 1990, plaintiffs filed this action seeking damages, injunctive relief, and a declaration that they have acquired a prescriptive easement over the old road. At the close of plaintiffs' evidence and at the close of all evidence, defendant moved for directed verdict. The court denied these motions. The case was submitted to a jury which found that plaintiffs had acquired an easement over defendant's land by adverse use of the old road for a period of 20 years prior to 27 September 1990, the date when this suit was filed. On 18 October 1994, Judge W. Steven Allen, Sr. entered judgment for plaintiffs and ordered defendant to remove all obstacles blocking the

BOGER v. GATTON

[123 N.C. App. 635 (1996)]

road. On 21 October 1994, defendant moved for judgment notwithstanding the verdict (JNOV). Judge Allen denied this motion by order entered 28 December 1994. Defendant appeals the denial of JNOV.

We first address a preliminary matter. N.C.R. App. P. 3(d) requires that a notice of appeal designate the judgment or order from which appeal is taken; this Court is not vested with jurisdiction unless the requirements of this rule are satisfied. *Smith v. Insurance Co.*, 43 N.C. App. 269, 272, 258 S.E.2d 864, 866 (1979). In her notice of appeal, defendant designates only the order denying her motion for JNOV. She does not give notice of appeal from the judgment itself. Accordingly, defendant's notice of appeal fails to properly present the underlying judgment for our review. See *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424-25 (1990). Thus, we only address the propriety of the denial of JNOV.

A motion for JNOV under N.C.R. Civ. P. 50(b) tests whether the evidence is legally sufficient to go to the jury. *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987). JNOV is proper only if it appears, as a matter of law, that a plaintiff cannot recover "upon any view of the facts which the evidence reasonably tends to establish." *Id.* at 734, 360 S.E.2d at 799.

At trial, plaintiffs sought to prove that they had acquired an easement by prescription. Prescriptive easements are not favored in the law. *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989). To obtain such a prescriptive easement, a claimant must prove: (1) that its use of the easement was adverse, hostile, or under a claim of right, (2) that the use has been open and notorious, (3) that the use was continuous and uninterrupted for a period of twenty years, and (4) that there is substantial identity of the easement for this twenty year period. *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974).

We first examine plaintiffs' evidence of adverse use. To prove adverse use, a claimant need not show a heated controversy or ill will; he must only show a use "of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Id.* at 581, 201 S.E.2d at 900. However, there must be some evidence showing that the use is "hostile in character" and that "tends to repel the inference that it is permissive and with the owner's consent." *Id.* In North Carolina, a use is presumed to be permissive; to prove otherwise, a claimant must rebut

BOGER v. GATTON

[123 N.C. App. 635 (1996)]

this presumption. *Id.* at 580, 201 S.E.2d at 900. A use that is merely permissive “can never ripen into an easement by prescription.” *Id.* at 581, 201 S.E.2d at 900.

Plaintiffs acquired the 112 acre farm on 30 August 1978 and filed this action in September 1990. Even if they could show that their use was adverse in 1978, in order to satisfy the twenty year prescriptive period, they would have to either (1) “tack” their ownership to that of Ed Johnson, their predecessor in title, or (2) prove that Ed Johnson had already acquired the easement by prescription at the time of the 1978 conveyance so that they acquired it by succession from his estate. *See id.* at 585, 201 S.E.2d at 903.

Defendant asserts that tacking is inappropriate here. However, even if we assume *arguendo*, that plaintiffs may tack a prior use in this manner or that plaintiffs acquired whatever easement rights they have by succession, the evidence simply fails to show that the use by Ed Johnson was adverse, hostile, or under claim of right.

The testimony at trial tends to show that the use by Ed Johnson was permissive from 1945, when the road was first built, at least until 1978 when plaintiffs acquired their land. James Johnson, Jr. testified that the road was first built by plaintiffs’ predecessor in title, Ed Johnson, after defendant’s predecessor in title, Sollie Stroud, gave Ed permission to build a road over his land. Testimony of other witnesses also tends to show that Ed used the road with Sollie’s permission.

Granted, there is evidence that both Ed and the Bogers maintained the road and such evidence can be enough, in some cases, to rebut the presumption that a use is permissive. *See Vandervoort v. McKenzie*, 105 N.C. App. 297, 301, 412 S.E.2d 696, 698 (1992). However, it is not enough here where the evidence shows that Ed Johnson created and then maintained the road incident to express permission given by Sollie Stroud and not as a means of giving notice to Mr. Stroud or others that he was claiming by adverse right. *See Skvarla v. Park*, 62 N.C. App. 482, 488, 303 S.E.2d 354, 358 (1983) (possession is presumed permissive until it is proven, by unequivocal acts, that the occupant intended to put the true owner on notice of its claim). After reviewing the evidence, we conclude that plaintiffs failed to rebut the presumption that use was permissive and that there is insufficient evidence of adverse use to support the jury verdict.

STATE v. TRUESDALE

[123 N.C. App. 639 (1996)]

To prove a prescriptive easement, a claimant must also show that there is a substantial identify of the easement claimed throughout the prescriptive period of twenty years. *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 901. Although there may be slight deviations in the line of travel, the use during the twenty year prescriptive period “must be confined to a definite and specific line.” *Id.*

Plaintiffs have attempted to demonstrate the easement’s location by introduction of a sequence of photographs taken shortly after Mr. Gattton blocked the road and by testimony of witnesses who stated that the road was the same for many years. Without accompanying maps, surveys, or more specific descriptions that delineate the easement over a 20 year period, these photographs and testimony fail to establish exactly where the purported prescriptive easement has been located throughout the prescriptive period.

Plaintiffs also rely on a 29 December 1992 survey prepared for defendant to show the identity of the easement. Although this survey does assist in locating the roadway easement as it was in 1992, it does not establish that the easement has been in a location that has been substantially the same throughout the prescriptive period. We conclude that plaintiffs’ evidence of substantial identity was insufficient to submit to the jury.

Given these evidentiary insufficiencies, the trial court erred by denying defendant’s motion for JNOV.

Reversed and remanded for entry of judgment in favor of defendant.

Judges EAGLES and MCGEE concur.

STATE OF NORTH CAROLINA v. DERRICK TRUESDALE

No. COA95-896

(Filed 20 August 1996)

Criminal Law §§ 1073.8, 1286 (NCI4th)— habitual felon status—prior record level—use of separate convictions obtained in same week—no error

Though the language and plain meaning of N.C.G.S. § 14-7.6 prohibit using the *same* conviction to establish both habitual

STATE v. TRUESDALE

[123 N.C. App. 639 (1996)]

felon status and prior record level, and the language and plain meaning of N.C.G.S. § 15A-1340.14(d) prohibit the use of more than one conviction obtained during the same calendar week to increase defendant's prior record level, nothing in the statutes prohibits the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another *separate* conviction obtained the same week to determine prior record level.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 10, 14.

Appeal by defendant from judgment entered 1 May 1995 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 16 April 1996.

Defendant pled guilty to possession with intent to sell cocaine and to his status as an habitual felon. Defendant's prior record included convictions of: 1) one count of assault with a deadly weapon in 1988; 2) two counts of common law robbery on 18 October 1988; 3) one count of possession with intent to sell and distribute cocaine and one count of possession of a firearm by a felon on 14 June 1991; and 4) one count of possession with intent to sell and distribute a counterfeit controlled substance and three counts of cocaine possession on 25 June 1992. The habitual felon indictment was based upon the following three felonies: 1) one of the convictions of common law robbery entered 18 October 1988; 2) the 14 June 1991 conviction for possession with intent to sell and distribute cocaine; and 3) the 25 June 1992 conviction for possession with intent to sell and distribute a counterfeit controlled substance.

The trial court determined defendant had eleven prior record points for sentencing purposes based on the following convictions: 1) the 1988 assault with a deadly weapon, a misdemeanor assigned one point under N.C. Gen. Stat. § 15A-1340.14(b)(5) (Cum. Supp. 1995); 2) one of the two 1988 common law robbery convictions, a Class H felony in 1988 but a Class G felony under N.C. Gen. Stat. § 14-87.1 (1993) at the time defendant committed the offense in this case, assigned four points pursuant to G.S. 15A-1340.14(b)(3); *See* G.S. 15A-1340.14(c) ("In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed."); 3) the 1991 conviction for possession of a firearm by a

STATE v. TRUESDALE

[123 N.C. App. 639 (1996)]

felon, a class I felony in 1991 but a Class H felony at the time of this offense under N.C. Gen. Stat. § 14-415.1(a) (1993 & Cum. Supp. 1995), assigned two points pursuant to G.S. 15A-1340.14(b)(4); 4) one of the three 25 June 1992 cocaine possession convictions, a class I felony under N.C. Gen. Stat. § 90-95(d) (1993 & Cum. Supp. 1995), assigned two points pursuant to G.S. 15A-1340.14(b)(4). The trial court added one point pursuant to G.S. 15A-1340.14(b)(6) because all of the elements of the offense of possession with intent to sell and distribute cocaine were also present in the prior conviction of possession with intent to sell and distribute cocaine. The trial court added an additional one point pursuant to G.S. 15A-1340.14(b)(7) because the offense was committed while defendant was on parole.

Based upon the eleven prior record points, pursuant to G.S. 15A-1340.17(c)(4) the court sentenced defendant as a category IV offender. As an habitual felon, defendant was sentenced as a Class C felon as required by N.C. Gen. Stat. § 14-7.6 (Cum. Supp. 1995). The court found four statutory mitigating factors and no aggravating factors. Upon finding the factors in mitigation outweighed the factors in aggravation, the court sentenced defendant to a minimum term of sixty-nine months and a maximum term of ninety-two months under the version of G.S. 15A-1340.14(c)(4) and (e) then in effect. (G.S. 15A-1340.14(c)(4) was amended effective 1 December 1995 to increase the minimum sentences for classes B2, C, and D.) From the judgment imposing this sentence, defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth Rouse Mosley, for the State.

Samuel L. Bridges for defendant-appellant.

McGEE, Judge.

Defendant argues the trial court erred in using three of his felony convictions to increase his prior record level when each of those convictions had been consolidated for judgment with a felony conviction used to establish habitual felon status. We find no error in the trial court's sentencing.

In this case, defendant had previously been convicted of two felonies on 18 October 1988, two more felonies on 14 June 1991, and four felonies on 25 June 1992. The State used one conviction from each of the three days to prove habitual felon status. The trial court then used another conviction from each day to determine prior

STATE v. TRUESDALE

[123 N.C. App. 639 (1996)]

record points. Defendant contends the court should not have used convictions consolidated with offenses used to establish habitual felon status to determine his prior record level.

Defendant bases this argument upon his interpretation of G.S. 14-7.6 and G.S. 15A-1340.14(d) as amended under the Structured Sentencing Act. G.S. 14-7.6 reads, in part: "In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." G.S. 15A-1340.14(d) states: "For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." Defendant, presenting an issue of first impression before this Court, argues that because the same conviction cannot be used to establish habitual felon status and prior record level, and because separate convictions during the same calendar week cannot be used to determine prior record level, it follows that separate convictions during the same week cannot be used to establish both habitual felon status and prior record level. We disagree.

The language and plain meaning of G.S. 14-7.6 prohibits using the *same* conviction to establish both habitual felon status and prior record level. The language and plain meaning of G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained during the same calendar week to increase the defendant's prior record level. However, we find nothing in these statutes to prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another *separate* conviction obtained the same week to determine prior record level.

The previous version of G.S. 14-7.6 allowed the same prior conviction to be used to establish habitual felon status and as an aggravating factor increasing the presumptive sentence. *See, e.g., State v. Roper*, 328 N.C. 337, 363, 402 S.E.2d 600, 615, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). The General Assembly amended G.S. 14-7.6 effective 1 January 1995 to prohibit the use of the same conviction to establish both habitual felon status and prior record level. Had the General Assembly also wished to prohibit the use of separate convictions within the same week for both purposes, they could have done so. Therefore, this assignment of error is overruled.

Defendant also argues the trial court erroneously failed to find as a mitigating factor pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(19) (Cum. Supp. 1995) that he had a positive employment history or was

WALKER FRAMES v. SHIVELY

[123 N.C. App. 643 (1996)]

gainfully employed. Defendant presented evidence of his employment history which was uncontradicted by the State. "The trial court is required to find a statutory mitigating factor . . . if the evidence supporting that factor is uncontradicted and there is no reason to doubt its credibility." *State v. Hood*, 332 N.C. 611, 623, 422 S.E.2d 679, 685 (1992), *cert. denied*, 507 U.S. 1055, 123 L. Ed. 2d 659 (1993). The State concedes defendant was entitled to this mitigating factor. However, defendant cannot show he was prejudiced by the trial court's failure to find this factor.

The court found the mitigating factors outweighed the aggravating factors and sentenced defendant to the lowest mitigated minimum term available for a category IV Class C felon under the version of G.S. 15A-1340.17(c)(4) then in effect. Therefore, even if the court had properly found the additional mitigating factor, the court still could not have sentenced defendant to a minimum term less than the sixty-nine month minimum term he received. As a result, defendant suffered no prejudice.

For the reasons stated, we find no prejudicial error in defendant's sentencing.

No Error.

Judges EAGLES and LEWIS concur.

WALKER FRAMES, A DIVISION OF B.P. LAND DEVELOPMENT, INC., PLAINTIFF V.
WILLIAM RAY SHIVELY AND DEWEY LESTER SHIVELY, DEFENDANTS

No. COA95-688

(Filed 20 August 1996)

**Trial § 227 (NCI4th)—voluntary dismissal—claim for damages
made by subsequent motion—granting of claim error**

Defendants could not assert a claim for damages for wrongful claim and delivery in a motion after plaintiff, through counsel, had already taken a voluntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a). Though plaintiff might be subject to disability due to its failure to prosecute its action after taking defendants'

WALKER FRAMES v. SHIVELY

[123 N.C. App. 643 (1996)]

property under a writ of claim and delivery, any claim arising due to this failure could be prosecuted only in a separate action.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 9 et seq.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict. 36 ALR3d 1113.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party". 66 ALR3d 1087.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR4th 778.

Appeal by plaintiff from order entered 17 February 1995 by Judge V. Bradford Long in Randolph County District Court. Heard in the Court of Appeals 29 February 1996.

On 22 March 1991, plaintiff filed a complaint alleging that defendants owed plaintiff \$11,657.00, which debt arose from defendants' purchase of furniture from plaintiff. In its complaint, plaintiff alleged that it had a lien on defendants' 1971 truck trailer and 1984 truck. Plaintiff sought recovery of the full amount owed plus possession of the truck and trailer as security. At this same time, plaintiff also filed an affidavit and request for a hearing in claim and delivery.

On 3 July 1991, the Randolph County Clerk of Superior Court, Lynda B. Skeen, granted plaintiff an order of seizure in claim and delivery, and the truck and trailer were subsequently seized. On 26 August 1991, the Randolph County District Court entered an order granting default judgment against defendant Dewey L. Shively, and giving defendant William R. Shively 10 days to file a responsive pleading. Within the time allotted, defendant William R. Shively filed an answer *pro se*, which answer was also signed by defendant Dewey L. Shively. After hearing on 9 September 1991, at which defendant William R. Shively appeared and defendant Dewey L. Shively did not, the trial court dismissed plaintiff's motion for default judgment against defendant William R. Shively, but refused to set aside the previously entered default judgment against defendant Dewey L. Shively.

WALKER FRAMES v. SHIVELY

[123 N.C. App. 643 (1996)]

Thereafter, the North Carolina Division of Motor Vehicles issued registration cards to plaintiff for both the truck and trailer on 11 September 1992. Defendant Dewey L. Shively thereafter duly moved to set aside the default judgment and, on 22 June 1993, the trial court granted defendant's motion. Then, at a calendar call on 11 April 1994, plaintiff through counsel took a voluntary dismissal without prejudice as to both defendants.

On 12 August 1994, defendants moved for "entry of dismissal and for order to return property and to assess damages for wrongful claim and delivery." Defendants served notice of this motion upon T. Thomas Kangur, Jr., then counsel of record for plaintiff. Defendants' motion was heard on 30 August 1994, and the trial court found (1) that neither plaintiff nor its attorney were present despite proper notice, (2) that plaintiff had failed to prosecute its action, (3) that plaintiff's action must be dismissed with prejudice, and (4) that defendants recover the truck and trailer and \$22,800.00 in damages. On 16 November 1994, defendants filed a motion seeking an additional \$15,000.00 in damages alleging that the truck and trailer were unavailable for return.

On 13 December 1994, the trial court granted defendants' motion and ordered that plaintiff pay the full amount of the damages requested. Again, despite proper notice, neither plaintiff nor plaintiff's counsel were present at the hearing. Ultimately, on 6 February 1995, plaintiff filed a Rule 60(b) motion to set aside the judgment. After hearing, the trial court denied plaintiff's motion.

Plaintiff appeals.

Hammond & Hammond, by L.T. Hammond, Jr., for plaintiff-appellant.

Moser, Schmidly, Mason & Roose, by Stephen S. Schmidly, for defendant-appellees.

EAGLES, Judge.

We first address plaintiff's argument that the trial court erred in failing to vacate a judgment that is void as a matter of law. Plaintiff argues that defendants could not assert a claim for damages in a motion after plaintiff, through counsel, had already taken a voluntary dismissal pursuant to Rule 41(a). We agree.

WALKER FRAMES v. SHIVELY

[123 N.C. App. 643 (1996)]

On 11 April 1994, plaintiff's attorney validly took a voluntary dismissal in open court pursuant to Rule 41(a)(1)(i) as noted in the minutes of the Randolph County Clerk of Superior Court. *Johnson v. Hutchens*, 103 N.C. App. 384, 385, 405 S.E.2d 597, 598 (1991). By taking this voluntary dismissal orally in open court before defendants asserted any counterclaim, plaintiff terminated all adversary proceedings in this case. G.S. 1A-1, Rule 41(a) (1983); *Fields v. Whitehouse & Sons Co.*, 98 N.C. App. 395, 397-98, 390 S.E.2d 725, 726-27, *disc. review denied*, 327 N.C. 427, 395 S.E.2d 676 (1990). A Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d) which authorizes the court to enter specific orders apportioning and taxing costs. *Fields*, 98 N.C. App. at 397-98, 390 S.E.2d at 726-27; *see also Universidad Central Del Caribe, Inc. v. Liaison Committee on Medical Education*, 760 F.2d 14, 19 n.4 (1st Cir. 1985) (stating that a Rule 41(a) dismissal "itself closes the file . . ." and, after a Rule 41(a) dismissal, "[t]here is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play."). Moreover, absent an ongoing lawsuit, the provisions of Rule 13(e) allowing a defendant to present a late arising claim "as a counterclaim by supplemental pleading . . ." are inapplicable. Accordingly, we conclude that defendant's only remedy here is to file a separate claim against the plaintiff in accordance with the provisions of Rule 3 and served in accordance with the provisions of Rule 4. *Davis v. Wallace*, 190 N.C. 543, 547-48, 130 S.E. 176, 179-80 (1925).

We note that defendants cite G.S. 1-475 in support of their position. G.S. 1-475 provides that a plaintiff seeking claim and delivery of a defendant's property must secure a bond in an amount equal to twice the value of the seized property so that the defendant will not be damaged in the event it can be shown that the plaintiff is not lawfully entitled to possession of the seized property. G.S. 1-475 (1885 & Supp 1995). Contrary to defendants' assertion, however, this language does not confer any right to prosecute an action in the manner attempted by defendants here.

In sum, we recognize that plaintiff here may be subject to liability due to plaintiff's failure to prosecute its action after taking defendants' property under a writ of claim and delivery. *Davis*, 190 N.C. at 547-48, 130 S.E.2d at 179-80. As we have stated, however, any claim arising due to this failure may be prosecuted only in a separate action. Accordingly, the order of the trial court is vacated and the cause is remanded to the trial court with direction to dismiss any purported

MOORE v. SULLIVAN

[123 N.C. App. 647 (1996)]

claims asserted by defendants' motion in this action. We need not address plaintiff's remaining assignments of error.

Vacated and remanded.

Judges JOHN and WALKER concur.

LOUIS MOORE, JR., PLAINTIFF-APPELLEE v. FRANK AND MARY LOU SULLIVAN,
DEFENDANT-APPELLANTS

No. COA95-1075

(Filed 20 August 1996)

1. Judgments § 157 (NCI4th)— answer not timely filed—less than all defendants in default—entry of default improper

The trial court erred in entering a default judgment against defendants because their answer, though untimely filed, was nevertheless filed before the trial court made an entry of default against them.

Am Jur 2d, Judgments § 286.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers. 21 ALR3d 1255.

2. Discovery and Depositions § 68 (NCI4th)— failure to answer interrogatories—default as sanction—joint liability—defaulting and nondefaulting parties

The trial court should not have imposed the sanction of default on the female defendant for failure to answer plaintiff's interrogatories where the interrogatories were addressed only to the male defendant. Furthermore, where joint liability was alleged, the trial court should have adjudicated the nondefaulting female defendant's liability before determining whether to enter a default judgment as a sanction against the defaulting male defendant.

Am Jur 2d, Depositions and Discovery §§ 391, 391.

MOORE v. SULLIVAN

[123 N.C. App. 647 (1996)]

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 ALR3d 1109.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 ALR4th 9.

Appeal by defendants from judgment entered 17 December 1993 and order entered 13 March 1995 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 21 May 1996.

On 26 March 1992, Louis Moore, Jr. (hereinafter plaintiff) filed a complaint against Frank and Mary Lou Sullivan and Brunswick Timber Corporation. Plaintiff alleged that Frank and Mary Lou Sullivan had attempted to sell standing timber on plaintiff's land to Brunswick Timber Corporation and that Brunswick had cut and sold the timber. Plaintiff alleged that defendants were jointly and severally liable for the fair market value of the cut timber.

The Sullivans were served with process on 1 April 1992. On 27 April 1992, defendants moved for an extension of time to answer and the trial court granted an extension until 27 May 1992. On 7 June 1992, plaintiff served interrogatories on Frank Sullivan. On 1 July 1993, plaintiff moved that "default be entered" against Frank and Mary Lou Sullivan for their failure to answer the interrogatories or file any other responsive pleading. The hearing on plaintiff's motion was scheduled for 6 July 1993. At 9:51 a.m. on 6 July 1993, Frank and Mary Lou Sullivan filed an answer to plaintiff's complaint claiming that the land on which Brunswick had cut timber belonged to Mary Lou Sullivan. At the hearing on 6 July 1993, Judge Orlando F. Hudson, Jr. struck the Sullivans' answer and entered a "judgement [sic] by default" against the Sullivans. The trial court retained jurisdiction of the matter on the issue of damages and awarded plaintiff \$475 "for legal services expended in seeking compliance with the Rules of Discovery."

On 4 October 1993, plaintiff filed a voluntary dismissal with prejudice as to Brunswick Timber Corporation. After a hearing on 16 December 1993, Judge D. Jack Hooks, Jr. concluded that the value of the cut timber was \$6,000 and that plaintiff was entitled to \$12,000 in damages after doubling the value pursuant to G.S. 1-539.1. Judge Hooks denied the Sullivans' (hereinafter defendants) motion for a new trial on 13 March 1995.

MOORE v. SULLIVAN

[123 N.C. App. 647 (1996)]

Defendants appeal.

Frank Cherry for plaintiff-appellee.

Peterson & Becker, by R. Glen Peterson, for defendant-appellants.

EAGLES, Judge.

Defendants first argue that the trial court erred in entering a default judgment against them because defendants' answer was filed before the trial court made an entry of default against them. We agree.

In its 8 July 1993 "Entry of Default," the trial court stated that it was entering a judgment by default against defendants. We have previously clarified that when one party fails to file an answer and the trial court enters a judgment determining the issue of liability but ordering a trial on the issue of damages, the judgment is only an entry of default rather than a default judgment. *See Bailey v. Gooding*, 60 N.C. App. 459, 461, 299 S.E.2d 267, 269, *disc. review denied*, 308 N.C. 675, 304 S.E.2d 753 (1983); *Pendley v. Ayers*, 45 N.C. App. 692, 694, 263 S.E.2d 833, 834 (1980). A judgment by default is a final judgment and the trial court's 8 July 1993 order was not a final judgment because the trial court retained jurisdiction of the case to determine the issue of damages.

[1] Here, the record shows that defendants filed an answer to plaintiff's complaint on 6 July 1993. Judge Orlando F. Hudson, Jr. entered and filed entry of default against defendants on 8 July 1993. (r at 32) After an answer has been filed, even if the answer is untimely filed, a default may not be entered. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567-68, 299 S.E.2d 629, 632 (1983); *Peebles v. Moore*, 302 N.C. 351, 356, 275 S.E.2d 833, 836 (1981). Accordingly, the trial court erred in entering default against Mary Lou Sullivan for failure to file an answer. We note that in the trial court's entry of default, Judge Hudson stated that "the defendants, Frank and Mary Lou Sullivan have offered no justifiable excuse or explanation for their failure to comply with the Rules of Discovery and the Court finds that the failure to comply was wilful." Plaintiff addressed his interrogatories to Frank Sullivan only. Accordingly, the trial court erred in imposing sanctions on Mary Lou Sullivan for failure to comply with the rules of discovery.

[2] It appears that the trial court sanctioned Frank Sullivan for failure to answer the complaint and for failure to answer plaintiff's

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

interrogatories. Rendering a judgment by default is an appropriate sanction for failure to answer interrogatories. G.S. 1A-1, Rule 37(d). However, in the default judgment situation when a plaintiff has alleged joint liability, a default judgment should not be entered against the defaulting defendant if one or more of the defendants do not default. Instead, "entry of judgment should await an adjudication as to the liability of the non-defaulting defendant(s)." *Harris v. Carter*, 33 N.C. App. 179, 182, 234 S.E.2d 472, 474 (1977). Because we have determined that entry of default against Mary Lou Sullivan was error, the trial court should have adjudicated Mary Lou Sullivan's liability before determining whether to enter a default judgment against Frank Sullivan. Accordingly, this case must be remanded for the trial court for a hearing regarding Mary Lou Sullivan's liability. We need not address defendants' remaining assignments of error.

Reversed and remanded.

Judges WYNN and SMITH concur.



PHYLLIS A. MARTIN, AND TITUS M. MARTIN, PLAINTIFFS v. THE CONTINENTAL INSURANCE CO., ALLSTATE INSURANCE COMPANY, AND KENNETH WAYNE MILLER, DEFENDANTS

No. COA95-633

(Filed 3 September 1996)

1. Insurance § 99 (NCI4th)— fleet policy—insurer's close connections with N.C.—applicability of N.C. law

The fleet policy of insurance issued, applied for, and delivered by defendant to plaintiff's employer in Kansas was governed by North Carolina law via our "close connections" rule, since defendant insured 1,479 of the employer's vehicles registered and used in North Carolina. N.C.G.S. § 58-3-1.

Am Jur 2d, Automobile Insurance § 235.

Choice of law as to validity of other insurance clause of uninsured motorist coverage. 83 ALR3d 221.

Conflict of laws in determination of coverage under automobile liability insurance policy. 20 ALR4th 738.

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

**2. Insurance § 510 (NCI4th)— rejection of UIM coverage—
Rate Bureau form required—applicability to fleet policies**

Defendant insurer was required to utilize the UIM rejection form promulgated by the Rate Bureau to effect a rejection of UM/UIM coverage, and there was no merit to defendant's contention that the form did not have to be used because the policy at issue was a fleet policy beyond the jurisdiction of the Rate Bureau.

Am Jur 2d, Automobile Insurance §§ 304-310.

Construction and application of statute designed to prevent avoidance of liability policy by reason of violation of its exclusions, conditions or other terms. 1 ALR2d 822.

Appeal by plaintiffs from summary judgment entered 4 January 1993 by Judge W. Russell Duke, Jr., in Lenoir County Superior Court. Heard in the Court of Appeals 28 February 1996.

Whitley, Jenkins & Associates, by Robert E. Whitley, for plaintiff appellants.

Wallace, Morris, Barwick & Rochelle, P.A., by P.C. Barwick, Jr., for defendant appellee Allstate Insurance Company.

Morris York Williams Surles & Brearley, by John F. Morris and Richard M. Chamberlain, for defendant appellee Continental Insurance Company.

SMITH, Judge.

In this declaratory judgment action, plaintiffs appeal the trial court's determination that plaintiff Phyllis Martin (Martin) was not afforded underinsured motorist (UIM) or uninsured motorist (UM) coverage through a fleet policy of insurance issued by defendant Continental Insurance Company (Continental) to Martin's employer. Two issues are presented by this appeal. The first question concerns whether the fleet policy at hand is governed by North Carolina or Kansas substantive law. We hold, pursuant to clear and controlling precedent, that the instant policy is governed by North Carolina law via our "close connections" rule. *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 106 N.C. App. 357, 416 S.E.2d 591 (1992), *aff'd*, 335 N.C. 91, 436 S.E.2d 243 (1993); and *see Johns v. Automobile Club Ins. Co.*, 118 N.C. App. 424, 455 S.E.2d 466, *disc. review denied*, 340 N.C. 568, 460 S.E.2d 318 (1995).

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

The second question concerns whether defendant Continental was required to utilize the UIM rejection form promulgated by the Rate Bureau to effect a rejection. Defendant Continental argues that, because the policy at issue was a "fleet policy," beyond the "jurisdiction" of the Rate Bureau, such form did not have to be utilized. This argument is without merit, as there is unequivocal precedent to the opposite effect. *Hendrickson v. Lee*, 119 N.C. App. 444, 459 S.E.2d 275 (1995); and see *Vasseur v. St. Paul Insurance Co.*, 1996 WL 445115 (N.C. App.) (filed 6 August 1996, No. COA95-458). As both of defendants' arguments are controlled by established precedent to the contrary, summary judgment was erroneously granted defendant Continental. Accordingly, we reverse.

The pertinent facts are as follows. Plaintiff Phyllis Martin was operating an automobile when she was struck and injured by a vehicle driven by defendant Kenneth Miller. Defendant Miller's vehicle was insured by North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) under a liability policy for damages up to \$100,000.00. At the moment of collision, plaintiff Martin was operating a vehicle owned by her employer, Carolina Telephone and Telegraph Company (Carolina Telephone). The Carolina Telephone automobile was insured for damages up to \$1,000,000.00 per accident under a policy issued by Continental. Plaintiffs were also insured through a personal automobile policy issued by Allstate Insurance Company (Allstate), which included UIM coverage up to \$100,000.00 per person.

On or about 17 June 1991, Farm Bureau paid the limits of defendant Miller's policy to plaintiff Martin in the amount of \$100,000.00. Thereafter, Martin sued Miller in tort. Prior to trial, defendant Continental moved for summary judgment on the issue of its potential liability to Martin for UIM and/or uninsured motorist (UM) coverage. At a pretrial hearing on defendant's motion, Judge W. Russell Duke, Jr., determined that Continental was not liable, and granted summary judgment in its favor on this issue. Plaintiffs attempted to appeal this ruling, but the appeal was dismissed as interlocutory. *Martin v. Continental Ins. Co.*, 113 N.C. App. 655, 441 S.E.2d 189 (1994).

Thereafter, a jury trial was held on Martin's claim with Judge G.K. Butterfield presiding. On 14 December 1994, the jury awarded plaintiff \$234,000.00 as damages for her injuries. Pursuant to this judgment, Judge James D. Llewellyn entered an order on 17 March 1995

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

directing Allstate to provide excess UIM coverage to plaintiff (per the provisions of her personal policy) up to its limit of \$100,000.00.

Plaintiffs had thus exhausted defendant Miller's liability policy coverage with Farm Bureau, and their own UIM coverage with Allstate. This left an amount in excess of \$34,000.00 outstanding on the judgment. The remaining issue, and the genesis of this appeal, is whether summary judgment was properly granted to Continental extricating it from UIM coverage liability on the judgment.

The Carolina Telephone automobile was covered by a policy of insurance issued by defendant Continental Insurance. The named insured on the Continental policy was United Telecommunications, Inc., the parent corporation of Carolina Telephone. Continental's policy provided liability coverage up to \$1,000,000.00 for each of the 8,282 vehicles owned or leased by United Telecommunications *or its subsidiaries*. Of the 8,282 vehicles, 1,479 were registered, located, and used for business purposes within the State of North Carolina at the time the Continental contract of insurance was issued.

Incorporated into the Continental policy was an exclusion of coverage entitled "Endorsement #11." This endorsement stated that United Telecommunications,

[i]n consideration of the premium at which this policy is written, [United Telecommunications agrees] that the insured has rejected uninsured/underinsured coverage where permitted by law and uninsured/underinsured coverage is otherwise provided at minimum limits as provided by law.

In exchange for execution of this endorsement (purportedly) rejecting UIM/UM coverage, United Telecommunications received a reduction in premium.

On a motion for summary judgment, the burden is on the moving party (here, defendant Continental) to establish that there is no triable issue of fact and entitlement to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 193 (1972). On appellate review, the moving party's papers are carefully scrutinized while those of the nonmoving party are indulgently regarded. *Sanyo Electric, Inc. v. Albright Distributing Co.*, 76 N.C. App. 115, 117, 331 S.E.2d 738, 739, *disc. review denied*, 314 N.C. 668, 335 S.E.2d 496 (1985).

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

I. Choice of Law: Kansas or North Carolina

[1] Defendant Continental argues that, since the instant policy was applied for, issued and delivered to United Telecommunications in the State of Kansas, and the intent of the parties (according to Continental) was that Kansas law would govern, Kansas law should dispose of the issues presented by this appeal. Applying North Carolina law to the instant policy, defendant contends, would violate due process. Defendant is mistaken.

Continental argues that either the doctrine of *lex loci contractus*, or alternatively “the intent of the parties,” should govern interpretation of the Continental policy. *See Tolaram Fibers, Inc. v. Tandy Corp.*, 92 N.C. App. 713, 717, 375 S.E.2d 673, 675, *disc. review denied*, 324 N.C. 436, 379 S.E.2d 249 (1989); and *see Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) (the substantive law of the state where the last act required to make a binding contract takes place controls all aspects of the interpretation of the contract); *Duke Power v. Blue Ridge Elec. Membership Co.*, 253 N.C. 596, 602, 117 S.E.2d 812, 816 (1961) (contracts are to be interpreted by the Court according to the intent of the parties to the contract). Continental argues that failure of this Court to follow one of these two doctrines, in this factual situation, would implicate due process. We disagree, and hold that neither of the choice of law approaches urged by defendant Continental are appropriate to the facts and legal context of this case.

In *Collins & Aikman v. Hartford Accident & Indemnity*, 335 N.C. 91, 95, 436 S.E.2d 243, 246 (1993), our Supreme Court rejected arguments identical to those defendant now asserts. In *Collins*, the plaintiff-corporation (Collins & Aikman) owned one hundred and two trucks, ninety-seven of which were titled in North Carolina. Collins & Aikman was a wholly-owned subsidiary of Wickes Companies, Inc. (Wickes), a Delaware corporation with its principal place of business in California. Wickes engaged an insurance broker in California to procure an insurance policy for its subsidiary company, Collins & Aikman.

The *Collins* defendant, Hartford Indemnity Insurance Company (Hartford), issued Wickes an excess liability policy which was sent to Wickes’ insurance broker in California, who then sent it to Collins & Aikman’s corporate offices in North Carolina. *Id.* at 93, 436 S.E.2d at 244. Thereafter, an accident occurred involving one of Collins & Aikman’s insured vehicles, with damages exceeding the limits of

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

Collins & Aikman's primary coverage. Collins & Aikman asserted that Hartford was liable for the remaining damages pursuant to its excess coverage policy. *Id.* at 93, 436 S.E.2d at 244-45.

The *Collins* Court determined that N.C. Gen. Stat. § 58-3-1 (1994) governed the business automobile policy at issue. *Id.* at 94, 436 S.E.2d at 245. N.C. Gen. Stat. § 58-3-1 states:

All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.

Hartford argued that applying § 58-3-1 to the Collins policy would violate due process, since "the interest of the forum has but slight connection with the substance of the contract obligations." *Collins*, 335 N.C. at 95, 436 S.E.2d at 245 (quoting *Hartford A. and I. Co. v. Delta and Pine Land Co.*, 292 U.S. 143, 150, 78 L.Ed. 1178, 1181, *reh'g denied*, 292 U.S. 607, 78 L.Ed. 1468 (1934)).

The *Collins* Court disagreed with Hartford's due process argument, holding that, "[North Carolina] has much more than a casual connection with the substance of the insurance policy." *Id.* The *Collins* Court also considered the analysis and holding of *Turner v. Liberty Mut. Ins. Co.*, 105 F.Supp. 723, 726 (E.D.N.C. 1952), wherein the *Turner* Court applied a due process analysis to the predecessor statute to § 58-3-1 in a motor vehicle liability case. *Collins*, 335 N.C. at 95, 436 S.E.2d at 245-46. The *Turner* Court held that it would violate due process to allow our predecessor statute to govern the issues present there without "regard[] [to] the relative importance of the interests of the forum as contrasted with those [interests] created at the place of the contract." *Id.* (quoting *Turner*, 105 F.Supp. at 726).

After considering a panoply of cases asserted by Hartford, the *Collins* Court concluded:

We believe that the distinction between this case and those cases upon which Hartford relies and which hold that N.C.G.S. § 58-3-1 or similar statutes do not apply or are unconstitutional, lies in the connection of this state with the interests insured. North Carolina has a **close connection** with the interests insured in this case. N.C.G.S. § 58-3-1 clearly means that the law of North Carolina applies and we do not believe the United States Constitution prohibits it.

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

Collins, 335 N.C. at 95, 436 S.E.2d at 246 (emphasis added). Applying this close connections rule, the *Collins* Court held that the ninety-seven trucks titled by Collins & Aikman in North Carolina, and insured by Hartford, bore more than a casual connection to this state. *Id.* at 95, 436 S.E.2d at 246.

Defendant Continental's argument against applicability of the *Collins* close connections rule to the instant facts consists of recapitulations of the *Hartford* and *Turner* holdings, and the *Collins* dissent. Continental argues *Collins* does not apply here, because only approximately eighteen percent (17.858%) of United Telecommunications' automobiles are registered in North Carolina, whereas in *Collins*, plaintiff Collins & Aikman had titled ninety-five percent (95%) of its vehicles within this state. See *Collins*, 335 N.C. at 93, 436 S.E.2d at 244. Defendant's attempt to pivot this Court's determination of close connections on the basis of mere percentages is erroneous.

Though Collins & Aikman titled 95% of its vehicles in North Carolina, that percentage represented only ninety-seven vehicles. In the instant matter, United Telecommunications registered 1,479 vehicles in this state, for a comparatively low 17.858% of the total number insured through the Continental policy. A high percentage figure of insured cars registered within North Carolina, versus a low percentage figure of those registered without, is not in and of itself determinative. The *Collins* Court did not intend to measure the quantum of a § 58-3-1 close connection through the abstraction of percentages versus percentages. To do so would lead to absurd and unintended consequences. Instead, the *Collins* Court concerned its analysis with the close connection between North Carolina and the "interests insured" by the motor vehicle policy. *Collins*, 335 N.C. at 95, 436 S.E.2d at 246.

The interests insured in *Collins* are the same interests which are insured here—motor vehicles and persons injured—that are covered by the insuring policy. *Collins*, 335 N.C. at 93, 96, 436 S.E.2d at 244, 246; *Johns*, 118 N.C. App. at 427, 455 S.E.2d at 468. Thus, *Collins* compels the conclusion that Continental's policy is governed by North Carolina law. In *Collins*, 97 vehicles were held to constitute a close connection. *Collins*, 335 N.C. at 96, 436 S.E.2d at 244. Here, defendant Continental insured 1,479 vehicles registered in North Carolina. Put in defendant Continental's percentage terminology, the number of North Carolina registered vehicles insured by Continental was over fifteen times the number insured by the *Collins* defendant.

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

In *Johns*, the only connection between the insurance policy there and North Carolina was the *situs* of the accident. *Johns*, 118 N.C. App. at 427, 455 S.E.2d at 468. The insured party in *Johns* secured the automobile policy in Tennessee, resided there, and was travelling east on Interstate 26 in Buncombe County when the accident occurred. *Id.* at 425, 427, 436 S.E.2d at 467, 468. “[T]hus, the accident [was] the only contact the parties had with North Carolina.” *Id.* at 427, 436 S.E.2d at 468. In its analysis, the *Johns* Court determined that no more than a “casual” connection existed between the interests insured and North Carolina, and thus Tennessee law applied. *Id.* at 428, 436 S.E.2d at 469.

In contrast to the vehicle involved in *Johns*, and the 97 insured vehicles involved in *Collins*, the instant defendant insured at least 1,479 vehicles which were registered and used in North Carolina. Our comparison of absolute numbers, rather than percentages, offers a true insight into the connections between the insured interests under the instant policy and the forum state North Carolina. Our application of *Collins* to these facts in no way offends due process. *Collins*, 335 N.C. at 95, 436 S.E.2d at 245-46; and see Richard A. Posner, *Due Process Limitations on Personal Jurisdiction*, in *Economic Analysis of Law* § 25.5 (4th ed. 1992). Defendant Continental’s approach to determining when close connections exist conflicts with the established meaning and public policy behind § 58-3-1, and would render virtually meaningless the protections intended by our Motor Vehicle Safety and Financial Responsibility Act. See N.C. Gen. Stat. § 20-279.21, *et seq.* (1993); *Collins*, 335 N.C. at 94, 436 S.E.2d at 245; *Nationwide v. Mabe*, 342 N.C. 482, 493-94, 467 S.E.2d 34, 41 (1996).

Under defendant’s approach, insurance companies would be free to obtain insurance for vast numbers of automobiles in this state, at the lower premiums dictated by the less stringent laws of other states, thereby avoiding the protections intended by our legislature. We decline to follow such a course. North Carolina law applies to the Continental policy, and the question of Continental’s use of Endorsement #11 as an attempted UIM rejection is properly before us for review on the merits.

II. Rejection of UM/UIM Coverage by Collins & Aikman

[2] Our discussion here is limited to consideration of defendant Continental’s UIM rejection arguments which are relevant to *North Carolina* law. Because neither party raises it, we do not address the underlying matter of plaintiff’s interpolicy stacking of her personal

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

nonfleet policy (issued by Allstate Insurance Company) with the UIM coverage afforded by the fleet policy of her employer. See *Nationwide v. Mabe*, 342 N.C. at 498, 467 S.E.2d at 43 (as modified in substantive part by Order of the Supreme Court entered 1 May 1996) (allowing stacking of a fleet policy on a passenger type vehicle with a nonfleet policy); *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 603, 461 S.E.2d 317, 320 (citations omitted) (“the interpolicy stacking of fleet and nonfleet policies is permissible”), (*reaffirming*, *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh’g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989)), *reh’g denied*, 342 N.C. 197, 463 S.E.2d 237 (1995).

Defendant acknowledges that the rejection language used in the United Telecommunications policy was not “on a form promulgated by the North Carolina Rate Bureau.” Defendant argues that the instant rejection is “valid and binding because it clearly and unambiguously rejects uninsured and underinsured motorists coverage.” This argument is beside the point, as it ignores the fact that,

[i]n *Hendrickson*, this Court strictly enforced the requirement that UIM coverage may be rejected only “in writing . . . on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance,” . . . in order to “assure compensation of the innocent victims of uninsured or underinsured drivers”—the primary purpose of the Act.

Vasseur, 1996 W.L. 445115, *3 (quoting *Hendrickson v. Lee*, 119 N.C. App. 444, 450, 457, 459 S.E.2d 275, 279, 283 (1995)).

The statute which governs the instant UIM coverage issue is the version of N.C. Gen. Stat. § 20-279.21(b)(4) in effect at the time the Continental policy was issued. See *White v. Mote*, 270 N.C. 544, 555, 155 S.E.2d 75, 82 (1967) (“Laws in effect at the time of issuance of a policy of insurance become a part of the contract . . .”). Moreover,

[w]hen a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy, *as if written into it*. If the terms of the statute and the policy conflict, the statute prevails.

Isenhour, 341 N.C. at 605, 461 S.E.2d at 322 (emphasis added).

It is undisputed that the version of N.C. Gen. Stat. § 279.21(b)(4) applicable to the instant policy is that which was in effect in 1988, which is the identical statute under review in *Hendrickson*.

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

Hendrickson, 119 N.C. App. at 449, 459 S.E.2d at 278; and *see* N.C. Gen. Stat. § 20-279.21(b)(4) (1988).

N.C. Gen. Stat. § 20-279.21(b)(4) (1988) provided as follows at the time of plaintiff's accident:

(b) Such owner's policy of liability insurance:

* * * *

(4) Shall . . . provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) [i.e. \$25,000.00/\$50,000.00] of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, *in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy.*

* * * *

The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage.

. . . Rejection of this coverage for policies issued after October 1, 1986, *shall* be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

(Emphasis added); and *see Hendrickson*, 119 N.C. App. at 449-50, 459 S.E.2d at 278-79. We note that Continental's policy with United Telecommunications has liability limits of \$1,000,000.00 per person.

Given the benefit of *Hendrickson* and *Isenhour*, and the plain language of N.C. Gen. Stat. § 20-279.21(b)(4), defendants' attempts to distinguish *Hendrickson* because the Continental policy was written out of state, and because the instant policy insured a fleet vehicle, are without merit.

We find this paragraph from *Hendrickson* unambiguous:

We observe first that the version of G.S. § 20-279.21(b)(4) in effect in 1990 provided that rejection of UIM coverage "shall" be in writing and on "*a form promulgated by the Rate Bureau and approved by the Commissioner of Insurance.*" *The language "shall" as applied in Chapter 20 of the North Carolina Motor*

MARTIN v. CONTINENTAL INS. CO.

[123 N.C. App. 650 (1996)]

Vehicle Statutes, is “mandatory” and not merely “formal” and “directory language.” Again, as of the date of plaintiff’s accident, only a single form complied with the statutory directives.

Hendrickson, 119 N.C. App. at 454, 459 S.E.2d at 281 (emphasis added) (citations omitted). By defendant’s own admission, Endorsement #11 was not completed on a “form promulgated by the Rate Bureau.” *Id.* Defendant’s argument is thus completely at odds with the above language from *Hendrickson*.

Defendant Continental also contends that, because the policy at issue was a fleet policy, *i.e.*, one that covers more than four vehicles, the Rate Bureau had no jurisdiction and “no authority or control over this policy.” *See Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 266, 382 S.E.2d 759, 763 (“A fleet policy is a single policy designed to provide coverage for a multiple and changing number of motor vehicles used in an insured’s business”), *reh’g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989); and *see* N.C. Gen. Stat. § 58-40-10 (1994). This “jurisdiction” argument is identical to the position taken by the insurer-defendant in *Hendrickson*, to wit:

PMA’s second primary contention is that failure to utilize a rejection form *identical* to that promulgated by the Rate Bureau did not operate to invalidate Sovran’s alleged rejection of UIM liability limits coverage. More particularly, PMA claims that the policy at issue did not fall within the *jurisdiction* of the Rate Bureau, *see* N.C. Gen. Stat. § 58-36-1 (1994), and thus use of the precise form promulgated by the Rate Bureau was not required.

Hendrickson, 119 N.C. App. at 455, 459 S.E.2d at 281 (emphasis added and in original).

The *Hendrickson* Court summarily rejected this argument, by straightforwardly holding that,

[b]y requiring rejection of UIM coverage to be accomplished by use of a specific Rate Bureau form, G.S. § 20-279.21(b)(4) *was not effectively conferring additional jurisdictional authority* to the Rate Bureau. Rather, the statute appears merely to have been concerned with avoiding confusion and ambiguity through the use of a single standard and approved form. Stated otherwise, we disagree with PMA’s conclusion that interpreting the relevant version of G.S. § 20-279.21(b)(4) as *mandating* use of a Rate Bureau form for rejection of UIM coverage within a fleet policy necessarily conflicts with G.S. § 58-36-1.

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

Id. at 456, 459 S.E.2d at 282 (emphasis added); *see also Vasseur*, 1996 WL 445115 at *3. The posture and facts of this case are identical in every material sense to the facts in *Hendrickson*.

Defendant Continental's brief does no more than restate the arguments posed by the insurer-defendant in *Hendrickson*. Therefore, our result is no different, and Continental's " 'UIM coverage must be in an amount equal to the policy limits for bodily injury liability specified in the policy.' " *Hendrickson*, 119 N.C. App. at 450, 459 S.E.2d at 279 (quoting *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 147, 400 S.E.2d 44, 50, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991)). For the reasons discussed, we hold that Continental's policy affords \$1,000,000.00 in UIM coverage to plaintiff, and summary judgment for Continental is reversed. The trial court's denial of plaintiffs' motion for summary judgment is reversed and remanded for a new hearing.

Reversed and remanded.

Judges GREENE and LEWIS concur.

PEGGY SMALLWOOD AND CRAIG MORNING, PLAINTIFFS v. CURTIS ANTHONY EASON,
PERDUE FARMS, INC., DWAYNE MORNING AND LAURA ANN GRANT,
DEFENDANTS

No. COA95-713

(Filed 3 September 1996)

**Workers' Compensation § 141 (NCI4th)— employees injured
while leaving work—applicability of Act—no jurisdiction in
trial court**

Plaintiffs were still within the scope of their employment at the time the collision in question occurred so that the Workers' Compensation Act was applicable, the Industrial Commission was thus the proper forum for their actions and the trial court was without jurisdiction where the evidence tended to show that plaintiffs' injuries occurred just moments after their shift had ended; they were being transported out of defendant employer's maintenance garage area to an after work destination when the accident occurred; the accident occurred on a road which provided the only ingress and egress to and from the plant area; the

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

accident occurred when plaintiff driver collided with a forklift left by defendant employee partially on the road; and the time, place, and circumstances surrounding the injury mandated a conclusion that the accident was in the course of plaintiffs' employment.

Am Jur 2d, Employment Relationship § 284; Master and Servant § 427; Workers' Compensation §§ 266, 270.

Injury while crossing or walking along railroad or street railway tracks, going to or from work, as arising out of and in the course of employment. 50 ALR2d 363.

Coverage of injury occurring between workplace and parking lot provided by employer, while employee is going to or coming from work. 4 ALR5th 585.

Judge GREENE dissenting.

Appeal by plaintiffs from directed verdict entered 29 March 1995 by Judge W. Russell Duke, Jr., in Bertie County Superior Court. Heard in the Court of Appeals 1 March 1996.

Gray, Newell and Johnson, L.L.P., by Angela Newell Gray and Mark V.L. Gray, for plaintiff appellants.

Haynsworth, Baldwin, Johnson and Greaves, P.A., by Charles P. Roberts III and Brian M. Freeman, for defendant appellees.

SMITH, Judge.

Before addressing any of the substantive issues posed by this appeal, we first contend with plaintiff appellants' failure to compile a record on appeal in accordance with N.C.R. App. P. 9 (1996). It is appellants' duty and responsibility to see that the record is in proper form and complete. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983); *Tucker v. General Tel. Co. of the Southeast*, 50 N.C. App. 112, 118, 272 S.E.2d 911, 915 (1980). Plaintiffs have failed in this duty.

The record has been styled incorrectly, in that the index page lists Guilford County as the county in which the judgment appealed from took place. Rendition of the directed verdict appealed from occurred in the Superior Court of Bertie County—not Guilford County. This incorrect listing of the county not only violates N.C.R. App. P. 9(a)(1)(b), but also directs this Court to issue its mandate to

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

an incorrect court. *See* N.C.R. App. P. 32. The record is not paginated in the manner prescribed by N.C.R. App. P. 9(b)(4), causing this Court to waste its time in its review of the record, and in searching for information referenced in the briefs. Appellant has also included trial memoranda in the record which address issues arising from defendant Perdue's motion for summary judgment prior to trial. These materials are not relevant to the assignments of error addressed to this Court on appeal (although they address similar issues), and to some extent, they reduce the appellate briefs to redundancy. *See* N.C.R. App. P. 9(b)(2). Due to these errors, appellants' counsel will be personally taxed with the costs of printing the memoranda of law filed in the trial court and included in the record on appeal. *Id.*

Plaintiffs assign error to the trial court's grant of defendants' motion for a directed verdict at trial, and to the admission of evidence concerning plaintiffs' health insurance coverage with the employer-defendant. We reach only the first issue. Because the trial court lacked subject matter jurisdiction under the exclusivity provisions of the North Carolina Workers' Compensation Act, we affirm. *See* N.C. Gen. Stat. § 97-9 (1991) and § 97-10.1 (1991).

The question presented by defendants' motion for a directed verdict is whether all the evidence supporting plaintiffs' claim, taken as true, considered in the light most favorable to plaintiffs, and given the benefit of every reasonable inference in plaintiffs' favor is sufficient for submission to the jury. *Tripp v. Pate*, 49 N.C. App. 329, 332-33, 271 S.E.2d 407, 409 (1980). If there is more than a scintilla of evidence supporting each element of a plaintiff's claim, the motion should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986).

Keeping this standard of review in mind, plaintiffs' evidence tended to show the following facts. Craig Morning, Peggy Smallwood, Dwayne Morning and Curtis Eason were employees of defendant Perdue Farms, Inc. (Perdue) at all times relevant to this dispute. Defendant Eason's actions were all within his function as an employee of defendant Perdue, and for purposes of our analysis here, his actions are imputed to his employer. *See generally, B. B. Walker Co. v. Burns International Security Services*, 108 N.C. App. 562, 565, 424 S.E.2d 172, 174, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993) (discussing the doctrine of *respondere superior*). On 23 March 1990 at approximately 2:30 a.m., plaintiffs Peggy Smallwood and Craig Morning were picked up after their shift at Perdue Farms main-

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

tenance garage by plaintiff Morning's brother, defendant Dwayne Morning. Dwayne Morning was driving an automobile owned by Laura Grant. (Upon motion of plaintiffs pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(2) (1990), claims against defendants Dwayne Morning and Laura Grant have been dismissed without prejudice by the trial court.)

At about the same time, a forklift driven by defendant Curtis Eason stalled in the road adjacent to the Perdue facilities. Eason was unable to move the forklift totally out of the road, thus leaving a portion of the forklift obstructing the roadway. This road is the only means of ingress and egress from the Perdue facility. Though open to the general public, no homes or businesses other than Perdue front the road. Generally speaking, this road is primarily used to move Perdue equipment from one portion of the facility to another and to provide employee access to the Perdue facility.

Shortly after leaving the Perdue garage, the car in which plaintiffs and Dwayne Morning were riding struck the stalled forklift. Trial testimony indicated that the stalled forklift would have been difficult to see in the dark, due to the poor lighting conditions on the road and lack of lights or reflectors on the forklift. Neither the driver of the car, Dwayne Morning, nor the passenger-plaintiffs saw the forklift prior to impact. On 9 March 1993, plaintiffs filed their complaint in Guilford County Superior Court, seeking to recover damages from defendants Curtis Eason, Perdue Farms, Dwayne Morning, and Laura Grant (the owner of the automobile) as a result of alleged negligence.

I. Plaintiffs' Scope of Employment

The threshold question presented by this appeal is whether plaintiffs were still within the scope of their employment at the time the collision with the Perdue forklift occurred. If the injuries suffered by plaintiffs arose out of and in the course of their employment, the appropriate remedial avenue was through North Carolina's Workers' Compensation Act (Act) under N.C. Gen. Stat. § 97.10.1, not the common law of negligence. See *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 580, 364 S.E.2d 186, 188 (1988); *Freeman v. SCM Corporation*, 311 N.C. 294, 295-96, 316 S.E.2d 81, 82 (1984) (*per curiam*). If the Act is indeed applicable to the injuries suffered by plaintiffs, then the trial court lacked subject matter jurisdiction over plaintiffs' claims and the proper forum was the Industrial Commission. *Id.*

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

A determination of whether an injured party is within the scope of her employment for workers' compensation purposes is a mixed question of law and fact. *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780, *aff'd*, 325 N.C. 702, 386 S.E.2d 174 (1989) (*per curiam*). An injury is solely compensable under the Act if it "arise[s] out of and in the course of the employment." *Roberts v. Burlington Industries, Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988); N.C. Gen. Stat. §§ 97.2(6) and 97.10.1. The concepts "arising out of the employment" and "in the course of employment" are indisputably intertwined, but are nonetheless distinct requirements. *Roberts*, 321 N.C. at 354, 364 S.E.2d at 420. "Arising out of" refers to "the origin or cause of the accidental injury," whereas "course of the employment" is a question oriented to the "time, place, and circumstances under which an accidental injury occurs." *Id.*

In *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E.2d 570 (1962), our Supreme Court adopted the position that,

"[i]f the employee be injured while passing . . . over [the premises] of another in such *proximity and relation* as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment . . . *the rule extends to include adjacent premises used by the employee as a means of ingress and egress* with the express or implied consent of the employer."

Id. at 232-33, 128 S.E.2d at 575 (emphasis added) (citation omitted). We find *Bass* instructive as to the instant scope of employment question on two fronts.

Plaintiffs' injuries occurred just moments after their shift as part of Perdue's "chicken catching crew" ended. Defendant Morning was in the process of transporting plaintiffs out of Perdue's maintenance garage area, to an after work destination, when the accident occurred. Plaintiffs were present in Perdue's maintenance garage and left via the road adjacent to Perdue, because this was the normal and necessary manner to exit the worksite on the date in question. Plaintiffs had no other means of ingress and egress to and from the plant area, other than via the adjacent road. This same road also served the entire population of the Perdue plant as a means to transport equipment and employees in and among the facility.

The general rule is that, "[w]here any *reasonable relationship* to the employment exists, or employment is a contributory cause, the

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

court is justified in upholding the award as 'arising out of employment.' " *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968) (quoting *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960). In the instant situation, the employee-plaintiffs were where they were because of their employment. The Perdue access road, while ostensibly public, was nevertheless the exclusive way for plaintiffs to get to, and leave, work. The peril faced by plaintiffs, *i.e.*, the disabled forklift, was also in the road due to the adjacent presence of the Perdue plant. In sum, all of these facts point to a proximate and reasonable relation between plaintiffs and their employer at the time of the accident. The injuries suffered by plaintiffs thus arose out of their employment with Perdue.

Analysis of whether plaintiffs' injuries occurred in the course of their employment is determined by reference to (1) the time, (2) place, and (3) circumstances surrounding the accident. *Culpepper*, 93 N.C. App. at 251-52, 377 S.E.2d at 783; *Roberts*, 321 N.C. at 354, 364 S.E.2d at 420. Course of employment is a broad concept, which "continues for a *reasonable time* after work ends, and may include time spent going to or coming from work." *Culpepper*, 93 N.C. App. at 252, 377 S.E.2d at 783. In the instant case, plaintiffs' injury occurred almost immediately after having left the Perdue garage, and immediately after their employment related duties had ceased. The time frame between the cessation of formal work related duties, and the accident, was therefore slight.

As stated earlier, the place requirement also extends to "adjacent premises used as a means of ingress and egress to the employer's premises." *Id.* In this case, Perdue did not own the road on which plaintiffs were injured. However, the road was dedicated by its use and location to employer related purposes. According to the record, Perdue is essentially "landlocked," save for this single road. This access road is the sole means of access to the Perdue facility and it is inextricably integral to the business as a whole. These factors, among the others present, lead us to conclude that plaintiffs were still within the scope of employment at the time of the accident.

The circumstances of the accident were also Perdue-centered. Plaintiffs were travelling on a road which also served as a transportation infrastructure for the Perdue plant itself. The road was used by Perdue as the central means for transporting machinery, like the instant forklift, from one area of its sprawling facility to another. Generally, accidents which occur en route to work, or during the

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

travel away from work, are not considered within the scope of employment. *Maurer v. Salem Co.*, 266 N.C. 381, 382, 146 S.E.2d 432, 433-34 (1966). This general rule is not absolute. When an employee is injured while travelling on property closely tied or annexed to his employer, that "injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance." *Bass*, 258 N.C. at 233, 128 S.E.2d at 575 (quoting *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, 72 L.Ed 507, 509 (1928)). Thus, the circumstances of this case appear to place plaintiffs' injuries squarely within the exception to the general scope of employment rule.

Viewed together, the time of the accident, the place the injury occurred, and the circumstances surrounding that injury, mandate a conclusion that the accident resulting in injuries was in the course of plaintiffs' employment. See *Culpepper*, 93 N.C. App. at 251-54, 377 S.E.2d at 783-84.

II. Subject Matter Jurisdiction: Industrial Commission or Superior Court?

Having concluded that plaintiffs' injuries occurred within the scope of their employment, we now hold plaintiffs' negligence claim was not properly brought in superior court, as that forum lacked subject matter jurisdiction over plaintiffs' claims. We note at the onset that the question of subject matter jurisdiction may be raised at any time, even on appeal. *McAllister*, 88 N.C. App. at 579, 364 S.E.2d at 188; N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (1990). Our Workers' Compensation Act provides the exclusive remedial avenue for plaintiffs' negligence claims. The exclusive remedy portion of our Act unambiguously states:

If the employee and employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative *shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise* on account of injury or death.

N.C. Gen. Stat. § 97-10.1 (emphasis added); *Stack v. Mecklenburg County*, 86 N.C. App. 550, 552, 359 S.E.2d 16, 17 (The Act is the "exclusive means of recovery for personal injuries resulting from the willful, wanton and reckless negligence of an employer."), *disc. review denied*, 321 N.C. 121, 361 S.E.2d 597 (1987).

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

This exclusivity rule is not a novel legal reality, as numerous cases have enunciated its applicability to cases like the instant one. *McAllister*, 88 N.C. App. at 580, 364 S.E.2d at 188; *Stack*, 86 N.C. App. at 552, 359 S.E.2d at 17; *Freeman*, 311 N.C. at 295-96, 316 S.E.2d at 82. The *Freeman* Court's *per curiam* opinion emphatically noted that

remedies [for injuries] under the Workers' Compensation Act are exclusive and [plaintiff] is therefore precluded from recovering against her employer in [an] independent negligence action. The trial court properly granted defendant's motion to dismiss for lack of subject matter jurisdiction.

* * * *

We wish to make it abundantly clear that in fact plaintiff had no "selection" as to the appropriate avenue of recovery for her injuries.

* * * *

[Plaintiff's] rights and remedies against defendant employer were determined by the Act and she was required to pursue them in the North Carolina Industrial Commission.

Id. at 295-96, 316 S.E.2d at 82. Given our earlier analysis establishing plaintiffs' injuries as within the ambit of their employment, plaintiffs' claims are controlled by the edict of *Freeman*. Since the instant plaintiffs' injuries are "covered by the Act, the right to bring an independent negligence action against the employer is barred by the existence of the workers' compensation remedy." *Stack*, 86 N.C. App. at 554, 359 S.E.2d at 18.

Apparently, no claim for workers' compensation was ever filed by the defendant employer in this case, even though notice was provided to Perdue that injuries had occurred due to plaintiffs' collision with the forklift. Based on Perdue's failure to so file, plaintiffs maintain the exclusivity rule does not apply, as "there is no provision in the North Carolina Act requiring an injured employee to file a claim for compensation for his injury with the North Carolina Industrial Commission It is the employer's duty to file a claim with the Industrial Commission in order to invoke that court's jurisdiction." This argument ignores a significant body of our law which holds to the contrary.

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

N.C. Gen. Stat. § 97-92(a) (1991) requires an employer to report any injury by accident if it keeps the employee from work for more than one day. *Knight v. Cannon Mills*, 82 N.C. App. 453, 465, 347 S.E.2d 832, 840, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986). Failure to abide by the reporting requirements subjects the employer to a penalty for noncompliance. *Id.*; see N.C. Gen. Stat. § 97-92(e). However, “this notice requirement does not invoke the jurisdiction of the Commission without the *employee* filing a claim.” *Id.* (emphasis added) (citing *Perdue v. Daniel International, Inc.*, 59 N.C. App. 517, 518-19, 296 S.E.2d 845, 846-47 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 647 (1983)). The burden is squarely on the plaintiffs to ensure that a claim is timely filed with the Commission, *Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983), *reh’g denied*, 311 S.E.2d 590 (1984), absent some showing of misconduct by the employer which prevented the employee from making the required filing. See *Knight*, 82 N.C. App. at 467-68, 347 S.E.2d at 841-42 (withholding knowledge that exposure to cotton dust may cause lung disease may raise the issue of estoppel against employer). In the instant case, plaintiffs failed to invoke the jurisdiction of the Commission by filing a claim, and no *Knight*-type exception applies on the facts presented by the record.

For the above-stated reasons, we hold that plaintiffs’ complaint states a claim exclusively compensable under the Workers’ Compensation Act. The superior court was without subject matter jurisdiction to hear plaintiffs’ claim, and the trial court properly granted defendants’ motion for directed verdict in favor of defendant Perdue and its employee Curtis Eason. Accordingly, the trial court is affirmed. Costs of printing the memoranda of law included in the record on appeal will be taxed to plaintiffs’ counsel personally.

Affirmed.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not agree with the majority that the plaintiffs’ injuries arose out of and were sustained in the course of their employment with Perdue. The plaintiffs had left their employment with Perdue and

SMALLWOOD v. EASON

[123 N.C. App. 661 (1996)]

were going home. The road on which they were traveling at the time of the collision was a state public road which was not controlled or maintained by Perdue.

The general rule is that injuries sustained by employees travelling to and from work do not arise in the course of employment. *Barham v. Food World*, 300 N.C. 329, 332, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). Our courts have recognized an exception to this general rule providing that injuries sustained by an employee "going to and from work" do arise in the course of the employment if those injuries are sustained while on the employer's premises. *Id.* at 332, 266 S.E.2d at 679. Our courts have specifically held that the "premises" exception applies only if the place where the injuries were sustained was either owned, maintained, or controlled by the employer. *Royster v. Culp, Inc.*, 343 N.C. 279, 282, 470 S.E.2d 30, 31 (1996); *Jennings v. Backyard Burgers of Asheville*, 123 N.C. App. 129, 131, 472 S.E.2d 205, 207-08 (1996). This is so even if the accident occurs at a place the employee is required to traverse in order to access his actual place of employment. *Royster*, 343 N.C. at 281, 470 S.E.2d at 31 (injuries sustained by employee crossing non-owned street to access workplace from parking lot where employee was required to park not within scope of premises exception).

In this case there is no evidence that Perdue owned, maintained or controlled the road on which the accident occurred. I would therefore hold that the plaintiffs were not in the course and scope of their employment with Perdue at the time of the accident and that the trial court had subject matter jurisdiction over this case. Furthermore, because I believe the evidence presented by the plaintiffs, when considered in the light most favorable to the plaintiffs, justify submitting this case to the jury, I would reverse the entry of directed verdict for the defendants and remand for trial.

DAUGHTRY v. CASTLEBERRY

[123 N.C. App. 671 (1996)]

TRAVIS F. DAUGHTRY AND GAYLE DAUGHTRY BIZZELL, CO-EXECUTORS OF
THE ESTATE OF RUTH ROBERTS DAUGHTRY, PLAINTIFFS v. ROBIN GENE
CASTLEBERRY AND GENE CASTLEBERRY, DEFENDANTS

No. COA95-372

(Filed 3 September 1996)

**Insurance § 535 (NCI4th)— UIM carrier—subrogation rights
waived—failure to advance settlement offer on timely
basis**

A UIM carrier waived its subrogation rights under N.C.G.S. § 20-279.21(b)(4) by failing to advance the \$100,000 tendered by the tortfeasors' liability carrier, Nationwide, within 30 days of the UIM carrier's receipt of a letter from Nationwide advising that it was tendering its policy limits, and there was no merit to plaintiff's contentions that written notice of the settlement must come from the insured, not the liability carrier, or that the 30 day time limit for preserving subrogation rights does not begin to run until the UIM insured reaches a final settlement with the underinsured motorist.

Am Jur 2d, Automobile Insurance § 445.

**Subrogation rights of insurer under medical payments
provision of automobile insurance policy. 19 ALR3d 1054.**

**When does statute of limitations begin to run upon an
action by subrogated insurer against third-party tortfea-
sor. 91 ALR3d 844.**

**Right to recover under uninsured or underinsured
motorist insurance for injuries attributable to joint tort-
feasors, one of whom is insured. 24 ALR4th 63.**

Judge GREENE dissenting.

Appeal by plaintiffs from order filed 5 January 1995 by Judge Coy E. Brewer, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 24 January 1996.

This is an action to determine insurance subrogation rights. Ruth Roberts Daughtry died from injuries she received in an automobile collision after her car was struck by a vehicle operated by defendant Robin Gene Castleberry and owned by defendant Gene Castleberry. Nationwide Mutual Insurance Company (Nationwide) provided liability coverage in the amount of \$100,000 per person/\$300,000 per acci-

DAUGHTRY v. CASTLEBERRY

[123 N.C. App. 671 (1996)]

dent for the Castleberry vehicle and United Services Automobile Association (USAA) provided underinsured motorist coverage (UIM) to Ms. Daughtry. Plaintiffs, as co-executors of the estate of Ms. Daughtry, filed claims seeking damages from the Castleberrys and UIM coverage from USAA. Bob Harrelson, a case management analyst for Nationwide, handled the claim against the Castleberrys on behalf of Nationwide and Holly Brown, an adjuster for USAA, handled the UIM claim against USAA.

On 8 April 1992, Harrelson sent a letter to plaintiffs offering to pay the \$100,000 Nationwide policy limit in settlement of plaintiffs' claim. The letter indicated the plaintiffs could accept the \$100,000 outright or could select one of two different structured settlement options. The letter also stated the offer was based upon the condition that Nationwide receive a proper release. On 14 May 1992, Harrelson forwarded a copy of the April 8th letter to Ms. Brown at USAA. Brown sent a letter to plaintiffs dated 29 May 1992 which stated: "It appears [Nationwide] has accepted full responsibility for this accident and have [sic] offered to tender their liability limits in the amount of \$100,000 to conclude this matter." The letter then offered to settle the UIM claim for an additional \$45,000 over and above the \$100,000 tendered by Nationwide.

On 29 July 1992, Brown sent a letter to the attorney for Ms. Daughtry's estate. The letter included USAA's check for \$100,000 as "an advance of Underinsured Motorist Coverage, to protect our Subrogation rights under the statue [sic]." USAA later settled plaintiffs' wrongful death claim for a total of \$200,000—the \$100,000 initially advanced on 29 July and an additional \$100,000 of UIM coverage under the USAA policy. Plaintiffs executed a release on 24 August 1993 which acknowledged receipt of the \$200,000 as "full and final settlement of any and all claims for damages" under the USAA policy and which stated the plaintiffs would cooperate with USAA in USAA's pursuit of any subrogation claim.

Plaintiffs filed this action 26 January 1994 on behalf of USAA seeking recovery from the Castleberrys of the additional \$100,000 above Nationwide's liability limits USAA paid to settle plaintiffs' claims. In their answer, defendants moved to dismiss the complaint for failure to join a necessary party and also claimed that USAA had waived any subrogation rights. The answer also denied any negligence on the part of defendants and asserted the defense of contributory negligence.

DAUGHTRY v. CASTLEBERRY

[123 N.C. App. 671 (1996)]

Defendants filed a motion to determine subrogation rights, which the trial court heard 12 December 1994. In an order filed 5 January 1995, the trial court ruled that USAA had waived all subrogation rights against defendants. From this order, plaintiffs appeal.

Wallace, Morris, Barwick & Rochelle, P.A., by Elizabeth A. Heath and Thomas H. Morris, for plaintiff-appellants.

Bailey & Dixon, L.L.P., by David S. Coats, for defendant-appellees.

McGEE, Judge.

The trial court ruled USAA waived its subrogation rights under N.C. Gen. Stat. § 20-279.21(b)(4) by failing to advance the \$100,000 tendered by Nationwide within 30 days of USAA's receipt of the 14 May 1992 letter from Bob Harrelson advising that Nationwide was tendering its policy limits. Plaintiffs argue USAA was not required to advance the \$100,000 within 30 days of receipt of the written notice because: 1) written notice of the settlement must come from the *insured*, not the liability carrier; and 2) the 30 day time limit does not begin to run until the UIM insured reaches a final settlement with the underinsured motorist. We disagree and affirm the order of the trial court.

Plaintiffs first contend written notice of the settlement offer must be made by the UIM insured to the UIM carrier. The statute governing subrogation rights of UIM carriers requires, in part, that:

No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist *where the insurer has been provided with written notice* before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice.

G.S. 20-279.21(b)(4) (emphasis added). Although the better practice would be for the insured to notify the UIM carrier when the insured has received an acceptable offer from the liability carrier, there is nothing in the statute which requires written notice to the UIM insurer be made directly by the insured. The statute simply requires

DAUGHTRY v. CASTLEBERRY

[123 N.C. App. 671 (1996)]

that written notice be given to the UIM carrier before the 30 day period in which to preserve subrogation rights begins to run. Plaintiffs argue this allows a liability carrier to "make many offers and copy them to the [UIM] carrier with no idea whatsoever that the injured party might accept any of the offers," and would require the UIM carrier "to advance payment based on all offers of any kind, regardless of whether it was one acceptable to the injured party, its insured." However, we see no problem in cases where, as here, the liability carrier has offered its policy limits in settlement of the injured party's claims.

In this case, USAA received written notice that Nationwide had offered its liability limit to plaintiffs by way of the 14 May 1992 letter sent by Nationwide to USAA. USAA further acknowledged it had notice of Nationwide's settlement offer in the 29 May 1992 letter from USAA to plaintiffs. Therefore, USAA received proper written notice of the settlement offer as required by G. S. 20-279.21(b)(4). This assignment of error is overruled.

Plaintiffs next contend the 30 day period did not begin to run because the 8 April 1992 offer of settlement, forwarded to USAA on 14 May, "was merely a preliminary negotiation or offer" and "not an actual settlement between the plaintiffs and Nationwide." Plaintiffs argue that a UIM carrier "cannot know when payment must be advanced to its insured until it knows when its insured has agreed to or accepted the terms of the offer." Because the 8 April offer contained different structured settlement options and was conditioned upon the plaintiffs signing a release, and USAA had no notice of plaintiffs' acceptance of the offer, plaintiffs contend the 14 May letter from Nationwide did not trigger the 30 day period. We again disagree.

The statute states that "where the insurer has been provided with written notice *before a settlement*" the insurer waives its subrogation rights unless it advances a payment to the insured "in an amount equal to the *tentative settlement*" within 30 days of receipt of the written notice. G.S. 20-279.21(b)(4) (emphasis added). Further, in *Gurganious v. Integon General Ins. Corp.*, 108 N.C. App. 163, 423 S.E.2d 317 (1992), *disc. review denied*, 333 N.C. 538, 429 S.E.2d 558 (1993), this Court held an insurer waived its right to subrogation where the insurer failed to advance the amount of the liability insurer's settlement offer. This Court recognized that G.S. 20-279.21(b)(4) requires that a UIM insurer be notified "when a claim is filed against the primary tort-feasor, and also when a settlement

DAUGHTRY v. CASTLEBERRY

[123 N.C. App. 671 (1996)]

offer has been made.” *Gurganious*, 108 N.C. App. at 166, 423 S.E.2d at 318 (emphasis added). This Court also found:

Plaintiffs in this case properly notified defendant of the claim as well as the settlement offer.

In accordance with the statute, *when the primary liability insurance carrier offered the limits of its policy in settlement*, [the UIM carrier] could have paid that amount to plaintiffs, thereby preserving its subrogation rights. However, [the UIM carrier] chose not to follow that course.

Id. at 166, 423 S.E.2d at 318-19 (emphasis added). Both the statute and case law require a UIM insurer be notified when a settlement offer is made, and when the primary liability insurance carrier has offered the limits of its policy in settlement, as was done in this case, the insurer must advance that amount to the insured within 30 days to protect its subrogation rights. Neither the statute nor case law require that the settlement be completed or that the UIM carrier must have notice of its insured’s acceptance of the offer. Therefore, this assignment of error is also overruled.

Here, the evidence shows USAA received written notice sometime between 14 May 1992 and 29 May 1992 that Nationwide had offered its \$100,000 policy limit in settlement of plaintiffs’ claims. However, USAA waited until 29 July 1992 to advance the amount of Nationwide’s settlement offer to plaintiffs. Therefore, USAA waived its subrogation rights by not advancing the \$100,000 to plaintiffs within 30 days of receipt of written notice of Nationwide’s settlement offer. After reviewing the record, we find no merit to plaintiffs’ remaining arguments. For the reasons stated, the order of the trial court is affirmed.

Affirmed.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority that the written notice required by N.C. Gen. Stat. § 20-279.21(b)(4) does not have to come from the plaintiffs and may properly come from the defendants’ liability carrier

DAUGHTRY v. CASTLEBERRY

[123 N.C. App. 671 (1996)]

(Nationwide). I do not, however, agree that the notice in this case (copy of 8 April 1992 letter from Nationwide to plaintiffs mailed to plaintiffs' UIM carrier (USSA) on 14 May 1992) was sufficient to begin the running of the section 20-279.21(b)(4) thirty-day time limit. This section provides that the UIM carrier, in order to preserve its subrogation rights, has thirty days after receipt of notice of a tentative settlement between its insured and the tortfeasor's liability carrier in which to "advance a payment to the insured in an amount equal to the tentative settlement." N.C.G.S. § 20-279.21(b)(4) (1993). In order for the UIM carrier to make an advance "equal to the tentative settlement" it is necessary that the notice provide the exact terms of the agreement.

In this case, notice was given to USAA by Nationwide on 14 May 1992 that Nationwide had offered to pay its policy limits to the plaintiffs in cash or pay in accordance with either of two different structured settlements. The offer to settle was further "based on the condition that Nationwide . . . receive a proper release." The record does not reveal any written notice to USAA as to which proposal, if any, the plaintiffs agreed to accept. Accordingly, even assuming that one of the three proposals was acceptable to the plaintiffs and that there was no disagreement about the nature of the release required by Nationwide, USAA was not in a position to know what amount to advance to the plaintiffs to preserve its subrogation rights. Thus because the notice of 14 May 1992 only informed USAA that Nationwide had made an offer to the plaintiffs and did not reveal that a tentative settlement had been reached, it was not sufficient to begin the running of the section 20-279.21(b)(4) thirty-day time period. I therefore would hold that USAA is not barred from seeking subrogation against the tortfeasors and would reverse the order of the trial court.

This Court's previous holding in *Gurganious v. Integon General Ins. Corp.*, 108 N.C. App. 163, 423 S.E.2d 317 (1992), *disc. rev. denied*, 333 N.C. 538, 429 S.E.2d 558 (1993) does not require a different result. In that case the notice to the UIM carrier, which was given by the plaintiffs, indicates that the plaintiffs were agreeable to accepting a cash settlement offer from the liability carrier. *Id.* at 164-65, 423 S.E.2d at 318. Thus the UIM carrier had clear notice that there was an agreement between the liability carrier and plaintiffs and the precise terms of that agreement.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 677 (1996)]

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, JACOB M. KAPLAN, AND DAVID S. KAPLAN, PLAINTIFFS v. PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, SCOTT ALLRED, STEPHEN MICHAEL BEALL, SETH HINSHAW, ALBERT HODGES, JEFFREY ALEXANDER KENDALL, FATHER CONRAD KIMBROUGH, JULIAN McCLAMROCH, BERNARD McHALE, DUANE RICHARDSON, CANDIDO ROSARIO, A/K/A CANDIDO ROSARIO MATOS, DR. KEITH SCHIMMEL, RONALD STEINKAMP, JOHN THOMPSON, KEVIN WOLPERT, LEIGH ALLRED, KAREN L. BEANE, VIRGINIA BELL, SHARON STEELE CLARK, MARIANA DONADIO, LIBBY DUNSMORE, RHONDA EDMONDS, A/K/A RHODA EDMONDS, THERESA FARLEY, PAMELA FORD ALLISON, YVONNE FORD, HARIETTE GABRIELE, GEORGIA GAINES, ELSIE GALAN, KARIN GRUBBE, DEBORAH HEBESTREIT, DIANNE McCLAMROCH, ELAINE McHALE, REBECCA MORRISON, MONICA POLLARD, CAROL REDMOND, MARTA RICHARDSON, ELIZABETH D. SALTER, A/K/A BETTY SALTER, KIMBERLY SCHIMMEL, ANNABELLE SIMPSON, BETTY STEINKAMP, LYNN THOMPSON, LAUREL TREDDINICK, AMBER WINFIELD, CATHERINE WOLPERT, JOHN DOES XX THROUGH XXVIII, AND JANE DOES XXXV XLII, DEFENDANTS

No. COA95-1098

(Filed 3 September 1996)

Appeal and Error § 95 (NCI4th)— order requiring disclosure of documents—no sanctions—order not appealable

The trial court's order requiring disclosure of documents relating to the assets, organization, or business activities of defendant Prolife Action League within a certain time period did not finally determine the action, since it contained no enforcement sanctions, and did not affect a substantial right; therefore, defendants' appeal from the order requiring disclosure is dismissed.

Am Jur 2d, Appellate Review §§ 136-138.

Appeal by defendants from order entered 26 April 1995 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 21 May 1996.

Smith Helms Mulliss & Moore, L.L.P., by Alan W. Duncan and Matthew W. Sawchak, for plaintiffs-appellees.

Arthur J. Donaldson and the American Center for Law & Justice, by Walter M. Weber, for defendants-appellants Linda Winfield, William H. Winfield, Jr., and Linda Winfield d/b/a the Prolife Action League of Greensboro.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 677 (1996)]

JOHNSON, Judge.

This is an appeal from an interlocutory order of the trial court requiring defendants to disclose certain financial records pursuant to a valid request for discovery filed by plaintiffs. The case history up to the entry of the order appealed from is as follows: Plaintiffs, a medical doctor and his family, filed a complaint seeking relief from alleged intimidation, harassment, and extortion visited upon them by defendants in protest of plaintiff doctor's practice of performing legal abortions. Plaintiffs moved for a preliminary injunction seeking to bar defendants from threatening plaintiffs or from picketing within a certain distance. The motion was allowed, and defendants appealed. This Court affirmed the issuance of the preliminary injunction. *See Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 431 S.E.2d 828, *appeal dismissed and disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 894 (1994).

During the pendency of the first appeal, plaintiffs served on defendants their first request for discovery of documents, including in paragraph eight (8), the following request: "Please produce all documents relating in any way to the assets, organization, or business activities of the Prolife Action League of Greensboro." Thereafter, defendant Prolife Action League (the League) sought a protective order to bar the discovery requested. By order dated 13 January 1994, the protective order was allowed in part and denied in part. The trial court denied protection insofar as the documents requested in paragraph eight (8) above, but permitted the League to produce the documents for an *in camera* inspection prior to releasing them to plaintiffs. The League petitioned this Court for a temporary stay and writ of supersedeas, both of which were dismissed on 13 January 1994. *See Kaplan*, No. 9416TS-PS.

On 30 November 1994, the trial court entered an order entitled "Consent Protective Order on Confidentiality" in which it was recognized that some of the necessary discovery and testimony over the course of the action may involve production and disclosure of sensitive and/or confidential information. In order to ensure that the use of such information be limited to the purposes of the litigation only, the order required that all information provided by both sides pursuant to the 27 October 1994 order be deemed "confidential," and permitted the parties on their own to so designate any future documents or testimony.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 677 (1996)]

Further, the order instructed that all confidential information be maintained by the attorneys of record, who would be held responsible for protecting the confidentiality of the subject matter. Finally, the order required that all documents filed with the court designated confidential be filed under seal, and all confidential information be returned to the producing party within thirty (30) days of the close of trial.

The League eventually submitted the documents to the trial court for review. Following review of the documents, the trial court entered an order in which it held:

1. The information contained in these documents is reasonably calculated to lead to the discovery of admissible evidence, as required by Rule 26(b) of the North Carolina Rules of Civil Procedure;

2. In light of the entire record compiled so far in this case, any First Amendment infringement that might result from disclosure of the documents to the plaintiffs does not warrant withholding these documents from the plaintiffs; and

3. The documents at issue contain sensitive and confidential information. These documents require protection against unrestricted disclosure or use to ensure that any information disclosed is used for purposes of this litigation only.

To that end, the court ordered that defendants provide plaintiffs with all unredacted copies of the documents at issue within thirty (30) days of the 26 April 1995 date of the order. Further, the court noted that all of the information contained in the documents would be subject to a Consent Protective Order on Confidentiality entered 30 November 1994 by the court and by stipulation of the parties. Defendants appeal from the trial court's discovery order requiring disclosure of "all documents relating in any way to the assets, organization, or business activities of [the League]" to plaintiffs under the terms of the Consent Protective Order on Confidentiality.

As noted above, the trial court's discovery order is interlocutory in that it is not a final order disposing of the case. *N.C. Farm Bureau Mutual Ins. Co. v. Wingler*, 110 N.C. App. 397, 429 S.E.2d 759, *disc. review denied*, 334 N.C. 434, 433 S.E.2d 177 (1993). Thus, we address the issue of appealability.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 677 (1996)]

An interlocutory order may be appealed if it qualifies under the provisions of North Carolina General Statutes sections 1-277 and 7A-27(d)(1) by demonstrating that a delay will result in prejudice or loss of a substantial right. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976). Generally, there is no right to appeal from an order compelling discovery as it does not affect a substantial right which would be lost if not reviewed prior to final judgment. *Mack v. Moore*, 91 N.C. App. 478, 372 S.E.2d 314 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). However, when a party's failure to comply with an order compelling discovery results in a finding of contempt or the assessment of other sanctions, the order does affect a substantial right and is immediately appealable. *See Benfield v. Benfield*, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

In the case before us, the order from which defendants appeal contains no enforcement sanctions. It merely orders defendants to produce the documents requested within a certain time period. Therefore, it does not finally determine the action, nor does it affect a substantial right which might "be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987); *see Mack*, 91 N.C. App. 478, 372 S.E.2d 314.

In the present case, defendants contend that the trial court's discovery order violates the associational privilege guaranteed by the First Amendment to the United States Constitution. Nevertheless, the mere assertion of a constitutional violation, without more, is insufficient to constitute a substantial right absent a finding of contempt or the imposition of other sanctions. Accordingly, the present appeal must be dismissed.

Dismissed.

Judges LEWIS and MARTIN, MARK D. concur.

ADAMS v. KELLY SPRINGFIELD TIRE CO.

[123 N.C. App. 681 (1996)]

CHARLES R. ADAMS, EMPLOYEE, PLAINTIFF-APPELLEE v. KELLY SPRINGFIELD TIRE COMPANY, EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLANTS

No. COA95-844

(Filed 3 September 1996)

1. Workers' Compensation § 452 (NCI4th)— review of Commission award—standard of proof

Defendants failed to state a legal basis upon which the Court of Appeals could properly review the Industrial Commission's findings where they confused the civil standard of proof, "by the greater weight of the evidence," with the standard applied to review of opinions arising from the Commission, "by any competent evidence."

Am Jur 2d, Appellate Review § 670.**2. Workers' Compensation § 252 (NCI4th)— inability to earn same wages—sufficiency of evidence—award of temporary total disability proper**

Plaintiff presented plenary competent evidence proving his inability to earn the same wages he earned prior to his injury, and such evidence was sufficient to support the Commission's award of temporary total disability compensation, where the evidence was to the effect that, although plaintiff was capable of some work, most employment would be futile due to plaintiff's pre-existing conditions, including his lack of education, manic depressive disorder, limitation on lifting due to his back, and lack of rehabilitative success.

Am Jur 2d, Workers' Compensation §§ 380-382.**Pleading aggravation of pre-existing conditions. 32 ALR2d 1447.**

Appeal by defendants from opinion and award entered by the North Carolina Industrial Commission on 7 June 1995. Heard in the Court of Appeals 27 March 1996.

Cranfill, Sumner & Hartzog, L.L.P., by Samuel H. Poole, Jr., and Nicholas P. Valaoras, for defendant appellants.

Douglas E. Canders for plaintiff appellee.

ADAMS v. KELLY SPRINGFIELD TIRE CO.

[123 N.C. App. 681 (1996)]

SMITH, Judge.

[1] This appeal is flawed by numerous and substantial errors of appellate procedure. Our Rules of Appellate Procedure are mandatory and subject an appeal to dismissal. N.C.R. App. P. 10 (1996); *Marsico v. Adams*, 47 N.C. App. 196, 197, 266 S.E.2d 696, 697-98 (1980). Defendants have brought forward eleven assignments of error (AOE), none of which state the page of the record where the alleged error occurred. An assignment of error must “direct[] the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*.” N.C.R. App. P. 10(c)(1) (emphasis added).

Defendants’ brief fares no better. Following defendants’ argument (question) headings, assignments of error appear without any reference whatsoever to the record or transcript. Assignments of error must be “identified by their numbers and by the pages at which they appear in the printed record on appeal.” N.C.R. App. P. 28(b)(5). Despite these errors we do not elect to dismiss. *See Symons Corp. v. Insurance Co. of North America*, 94 N.C. App. 541, 543, 380 S.E.2d 550, 551-52 (1989).

We are asked to review this appeal from the opinion and award of the Full Commission (Commission) based on defendants’ ten assignments of error (AOE’s 1-10), which address Findings of Fact Nos. 5, 6, 9, 10, 11, 12, 13, 14, 15, 16. All ten of these findings of fact are error, defendant contends, because they are “contrary to the *greater weight* of competent evidence in the record.” (Emphasis added.) This is not the standard of review we apply to opinions and awards rendered by the Industrial Commission. This Court’s review is limited to a consideration of whether there was *any competent evidence* to support the Commission’s findings of fact and whether these findings of fact support the Commission’s conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982).

Defendants have apparently confused the civil standard of proof, sometimes referred to as “by the greater weight of the evidence,” with the standard applied to review of opinions arising from the Commission. *See, e.g., In re Wadsworth*, 30 N.C. App. 593, 596, 227 S.E.2d 632, 633, *disc. review denied*, 291 N.C. 175, 229 S.E.2d 692 (1976). The “any competent evidence standard” is a longstanding rule, which provides that findings of fact made by the Commission are conclusive on appeal if supported by *any* competent evidence. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104

ADAMS v. KELLY SPRINGFIELD TIRE CO.

[123 N.C. App. 681 (1996)]

(1981). This is so even if there is evidence which would support a finding to the contrary. *Id.* Hence, on appeal, this Court is limited to two inquiries: (1) whether any competent evidence exists before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decision. *Id.*

Defendants have thus failed to state a legal basis upon which this Court can properly review the Full Commission's findings of fact, or the evidentiary basis thereof. Furthermore, defendants' characterization of the Full Commission's findings of fact, as being "contrary to the greater weight of the evidence," does not comport with our Supreme Court's mandate that the Industrial Commission and the courts are to construe the Workers' Compensation Act liberally in favor of the injured worker. *Cates v. Hunt Construction Co.*, 267 N.C. 560, 563, 148 S.E.2d 604, 607 (1966). Applying the "greater weight standard" instead of the "any competent evidence standard" would not favor the worker and would be in discord with settled law regarding the proper standard of review. Thus, all of defendants' assignments of error relating to the Commission's findings of fact are deemed abandoned. *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994).

The remaining assignment of error, No. 11, reads as follows: "The Full Commission's finding that defendants shall pay plaintiff temporary total disability compensation commencing on December 4, 1992, and continuing until plaintiff returns to work or until further orders of the Industrial Commission and Item Number 1 of the Award. Conclusion of Law Number 1 of the Opinion and Award for the Full Commission. Record pp.[we note the page number(s) are missing.]" It seems apparent, though, that defendants intended for AOE No. 11 to address an error of law by the Commission.

Standing alone, as AOE No. 11 must, it is manifest that this assignment is also fatally flawed. An assignment of error must independently "state plainly and concisely and without argumentation the basis upon which error is assigned." *Kimmel v. Brett*, 92 N.C. App. 331, 334, 374 S.E.2d 435, 436 (1988); N.C.R. App. P. 10(c). Examples of the proper way to state assignments of error in the record on appeal can be found in Appendix C, Table 4, of our appellate rules. Not only does AOE No. 11 purport to address a "finding" of the Full Commission, it does not in and of itself point out the legal error it purports (we think) to address.

ADAMS v. KELLY SPRINGFIELD TIRE CO.

[123 N.C. App. 681 (1996)]

We assume, for the sake of this discussion, that defendants' preamble to its listed AOE's was meant to give substance to AOE No. 11. That preamble states: "Defendants-Appellants assign the following as error and contrary to the greater weight of competent evidence in the record." As previously addressed in this opinion, we do not recognize such a standard of review from the Industrial Commission. Thus, ascribing this standard to a conclusion of law made by the Full Commission is not "a sufficient basis upon which to assign error." *Kimmel*, 92 N.C. App. at 334, 374 S.E.2d at 437. This assignment is therefore overruled.

[2] Notwithstanding the stark errors committed by defendant in presenting this appeal, we exercise our discretion, pursuant to N.C.R. App. P. 2, to suspend the rules and decide this case on the merits. Defendants argue in their brief that "[p]laintiff has failed to prove he was disabled after December 4, 1992 within the meaning of the North Carolina Workers' Compensation Act and most recent interpretative case law." We disagree.

Both parties cite *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), as setting forth a methodology by which a worker may prove that he is disabled within the meaning of our Workers' Compensation Act (Act). *But see Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995) (discussing presumptions of disability). We note that *Russell* provides for at least four separate and independent ways by which an employee may demonstrate that he is disabled. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Disability is defined by the Act as "the impairment of the injured employee's earning capacity [as a result of a workplace injury] rather than physical disablement." *Id.*; see N.C. Gen. Stat. § 97-2(9) (1991).

We have reviewed the record in light of *Russell*, and conclude that plaintiff presented plenary competent evidence proving his inability to earn the same wages he earned prior to his injury. Competent evidence was presented to the effect that, although plaintiff is capable of some work, most employment would be futile due to plaintiff's pre-existing conditions, *i.e.*, his lack of education, manic depressive disorder, limitations on lifting due to his back and lack of rehabilitative success. The evidence pertinent to these factors was duly noted and accounted for in the Full Commission's findings of fact. The Full Commission's findings of fact were based on competent evidence, and the conclusions of law derived therefrom

OUTDOOR EAST v. HARRELSON

[123 N.C. App. 685 (1996)]

were correct. Thus, the instant opinion and award of the Full Commission is

Affirmed.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

OUTDOOR EAST, L. P., A NORTH CAROLINA LIMITED PARTNERSHIP, PETITIONER v. THOMAS J. HARRELSON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. COA94-1303

(Filed 3 September 1996)

**Highways, Streets, and Roads § 31 (NCI4th)— billboards—
authority of DOT to regulate**

The Department of Transportation had the authority to regulate all nonconforming billboards in noncommercial/nonindustrial areas, including those erected prior to enactment of the Outdoor Advertising Control Act.

Am Jur 2d, Advertising §§ 8, 24-29.

Classification and maintenance of advertising structure as nonconforming use. 80 ALR3d 630.

On remand from the Supreme Court in light of its decision in *Appalachian Poster Advertising Co. v. Harrington*, 343 N.C. 303, 469 S.E.2d 554 (1996).

Wilson & Waller, by Betty S. Waller, Kenneth C. Haywood and Brian E. Upchurch for petitioner.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson Kelley and Associate Attorney General Melanie Lewis Vtipil, for respondent.

JOHN, Judge.

On 6 February 1996, this Court in an unpublished *per curiam* opinion, see *Outdoor East v. Harrelson* (COA94-1303), relied upon the majority opinion in *Appalachian Poster Advertising Co. v.*

OUTDOOR EAST v. HARRELSON

[123 N.C. App. 685 (1996)]

Harrington, 120 N.C. App. 72, 460 S.E.2d 887 (1995), to affirm the trial court's conclusion in the case *sub judice* that

the authority delegated to the North Carolina Department of Transportation pursuant to N.C. Gen. Stat. 136-126, *et. seq.*, does not include the authority to promulgate regulations governing nonconforming outdoor advertising located in areas other than zoned industrial or commercial areas or unzoned commercial or industrial areas, including petitioner's sign affected herein. . . .

However, on appeal, in *Appalachian Poster Advertising Co. v. Harrington*, 343 N.C. 303, 303, 468 S.E.2d 554, 555 (1996), our Supreme Court reversed the majority holding in *Appalachian* “[f]or the reasons stated in the dissenting opinion by Judge Lewis,” and thereafter allowed the petition of respondent herein for discretionary review under N.C.G.S. § 7A-31 for the limited purpose of remanding the instant case to this Court in light of the *Appalachian* decision. This Court thereafter granted petitioner's motion to allow the parties to file supplemental briefs, and we have fully considered same in determining whether the Supreme Court opinion in *Appalachian* affects our previous opinion.

Petitioner attempts to distinguish *Appalachian* on the basis that “in this case there is not the issue of rebuilding or of building a ‘new sign’ which was the underpinning of Judge Lewis’ dissent in that case.” Therefore, petitioner continues, we should allow our previous holding in this case to survive the reversal of *Appalachian* and reaffirm that

DOT has not been delegated authority to regulate the “erection and maintenance” of nonconforming billboards beyond the parameter established in *Appalachian* allowing DOT to determine when a “new sign” has been erected and ordering its removal.

We disagree.

In his *Appalachian* dissent, Judge Lewis stated that

[r]eal together, [N.C. Gen. Stat. §§ 136-130 and 136-133] grant the Department the authority to grant new permits, to revoke existing permits, and to promulgate rules and regulations for this purpose. . . . I do not agree [with the majority] that the Department can only regulate signs “permitted” under N.C.G.S. sections 136-129, 136-129.1, [and] 136-129.2. The Department is given, both directly and implicitly, the authority to determine

OUTDOOR EAST v. HARRELSON

[123 N.C. App. 685 (1996)]

which signs meet the requirements set forth in these sections and which signs do not. The power to make this determination in essence is the power to regulate.

Appalachian, 120 N.C. App. at 79, 460 S.E.2d at 891 (emphasis in original.) Accordingly, Judge Lewis concluded the Department of Transportation (DOT) had regulatory power over the nonconforming billboard at issue therein, despite its location in a noncommercial/nonindustrial area, and thus DOT was authorized to revoke the permit of Appalachian Poster Advertising pursuant to N.C. Admin. Code tit. 19A, r. 2E.0210(6) and (12) ("Any valid permit issued for a lawful outdoor advertising structure shall be revoked by the appropriate district engineer for any one of the following reasons: . . . (6) [any] alterations to a nonconforming sign . . . and (12) abandonment, destruction, or discontinuance of a sign . . .").

We find persuasive respondent's contention that the language of Judge Lewis' dissent does not simply address conversion of "grandfathered" billboards into new billboards, but rather speaks to "DOT's regulatory authority over *all* nonconforming signs in noncommercial/nonindustrial areas." Moreover, because we have previously determined the "dispositive issue . . . [of] whether DOT was authorized to regulate petitioner's nonconforming sign, located in a noncommercial/nonindustrial area and in existence prior to enactment of the [Outdoor Advertising and Control Act,]" to be "nearly identical" to the issue resolved by *Appalachian*, see *Outdoor East* (COA94-1303, filed 6 August 1996), petitioner's attempt to distinguish the two cases is unfounded. Therefore, in that our Supreme Court adopted Judge Lewis' dissent in *Appalachian*, we conclude herein that DOT had the authority to revoke petitioner's permit pursuant to N.C. Admin. Code tit. 19A, r. 2E.0210(9) ("Any valid permit . . . shall be revoked for . . . (9) unlawful violation of the control of access on interstate, freeway, and other controlled access facilities."), and that the trial court erred in concluding as a matter of law that DOT lacked such authority.

Petitioner nonetheless asserts a contention raised in its cross-appeal, *i.e.*, that "the trial court erred in finding that petitioner's outdoor advertising permit can be revoked based on the illegal conduct of its advertiser's employees." This contention cannot be sustained.

In *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 434 S.E.2d 229 (1993), *disc. review denied and appeal dismissed*, 335

OUTDOOR EAST v. HARRELSON

[123 N.C. App. 685 (1996)]

N.C. 566, 441 S.E.2d 135 (1994) (“Whiteco I”), the trial court awarded petitioner counsel fees pursuant to N.C. Gen. Stat. § 6-19.1 based upon its determination that respondent DOT was not substantially justified in revoking petitioner’s outdoor advertising permit. *Id.* at 817, 434 S.E.2d at 231. However, this Court reversed, holding “DOT was [indeed] substantially justified in revoking petitioner’s permit,” because petitioner, owner of the billboard, had violated N.C. Admin. Code tit. 19A, r. 2E.0210(8) when employees of its advertiser unlawfully destroyed ten trees on the highway right of way in front of the sign. *Id.* at 821, 434 S.E.2d at 234. “To accept [petitioner’s] argument” that it should not be found responsible for its advertiser’s employees’ violation of the regulation, the Court continued,

would be tantamount to inviting circumvention of the law, and we reject it. Petitioner’s responsibility to abide by DOT’s requirements . . . did not end when it leased billboard space to a third party, and it is not excused when an agent of the third party violates those requirements.

Id. at 821, 434 S.E.2d at 233. *See also* companion case of *Whiteco Industries, Inc. v. Harrington*, 111 N.C. App. 839, 844, 434 S.E.2d 234, 237 (1993), *disc. review denied and appeal dismissed*, 335 N.C. 565, 441 S.E.2d 135 (1994) (“Whiteco II”) (substantial justification for permit revocation existed upon violation of N.C. Admin. Code tit. 19A, r. 2E.0210(9) by employee of advertiser who crossed control of access fence).

Petitioner’s arguments notwithstanding, the foregoing cases cannot be distinguished from that *sub judice*, nor do we find merit in petitioner’s assertion that language in the *Whiteco* opinions holding a sign owner responsible for actions of employees of the owner’s advertisers “is dicta which can, and should, be rejected by this Court.” As in *Whiteco I* and *Whiteco II*, petitioner herein had the

responsibility to abide by DOT’s requirements . . . [which] did not end when it leased billboard space to a third party, and it is not excused when an agent of the third party violates those requirements.

See Whiteco I at 821, 434 S.E.2d at 233. Accordingly, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher

BYERS v. N.C. SAVINGS INSTITUTIONS DIVISION

[123 N.C. App. 689 (1996)]

court.”) (citations omitted), we hold the trial court properly ruled “petitioner’s [outdoor advertising] permit can be revoked” based upon the illegal conduct of its advertiser’s employees.

Based on the foregoing, we affirm that portion of the trial court’s order determining petitioner’s permit subject to revocation in consequence of illegal acts by employees of its advertiser. However, the judgment of the trial court decreeing that the “final decision of respondent . . . was not made in accordance with the statutory authority contained in N.C. Gen. Stat. § 136-126 *et. seq.*” is reversed. Further, this Court’s opinion in *Outdoor East v. Harrelson* (COA94-1303, filed 6 February 1996) is vacated.

Affirmed in part; reversed in part.

Judges EAGLES and LEWIS concur.

JAMES E. BYERS, WILLIAM J. BYERS, BILL GARDNER, JOHN A. KENNEDY,
J. GORDON SCOTT, J. GORDON SCOTT, III AND HAROLD K. STALLCUP,
PETITIONERS v. NORTH CAROLINA SAVINGS INSTITUTIONS DIVISION,
RESPONDENT, AND CENTURA BANK AND CENTURA BANKS, INC., INTERVENORS

No. COA96-297

(Filed 3 September 1996)

**Administrative Law and Procedure § 72 (NCI4th)— action
remanded to agency for hearing—order interlocutory—no
right to appeal**

Respondent and intervenors had no right to appeal from the trial court’s order remanding the action to an agency for a contested case hearing, since the order was interlocutory because it directed further action prior to a final decree and avoidance of a hearing did not affect a substantial right.

Am Jur 2d, Administrative Law § 640.

Appeal by respondent and intervenors from orders entered 2 March 1995 by Judge Jack A. Thompson in Wake County Superior Court and 31 October 1995 by Judge Knox V. Jenkins. Heard in the Court of Appeals 19 August 1996.

BYERS v. N.C. SAVINGS INSTITUTIONS DIVISION

[123 N.C. App. 689 (1996)]

On 13 May 1994, petitioners filed a complaint against respondent North Carolina Savings Institutions Division in Superior Court, Wake County. On 8 June 1994, respondent filed a motion to dismiss for lack of subject matter jurisdiction, for failure to state a claim upon which relief can be granted, and for lack of personal jurisdiction. On 25 April 1995, a consent order was entered allowing Centura Bank and Centura Banks, Inc. to intervene.

On 2 March 1995, the trial court entered an order denying respondent's motion to dismiss. Following a hearing held on 11 and 13 September 1995, the trial court entered an order in which it made the following pertinent findings of fact:

1. This is a proceeding for judicial review pursuant to Chapter 150B of the North Carolina General Statutes.

2. The petitioners are members of the First Savings Bank of Forest City and they challenge the decision of the Savings Institution Division approving the conversion of this bank into a stock owned bank and the simultaneous merger of this stock owned bank into Centura Bank.

3. The Savings Institution Division issued final agency approval of the conversion/merger on October 14, 1993.

4. The petitioners filed their Petition for Contested Case Hearing and Request for Contested Case Hearing on November 19, 1993.

5. At the December 13, 1993 meeting of the Savings Institutions Division Commission it declined the petitioners' request for hearing and delegated to the Savings Institution Administrator the authority to enter a final decision on the petitioners' petition.

6. On April 13, 1994, the Administrator of the Savings Institution Division issued a final agency decision denying petitioner's petition on the grounds, inter alia, that petitioners lacked standing and had failed to exhaust administrative remedies.

7. On May 13, 1994, petitioners filed this action requesting judicial review of the Administrator's decision denying the petitioners' contested case petition.

Based upon the findings of fact, the trial court made the following conclusions of law:

BYERS v. N.C. SAVINGS INSTITUTIONS DIVISION

[123 N.C. App. 689 (1996)]

1. Petitioners have standing to petition for a contested case hearing challenging the Savings Institutions Division's approval of the conversion/merger of First Savings Bank of Forest City.

2. The Savings Institution Division issued final agency approval of the conversion/merger on October 14, 1993.

3. The petitioners timely filed their Petition for Contested Hearing and Request for Hearing with the Savings Institutions Division.

4. The petitioners timely exhausted their administrative remedies or it would be futile for them to do so.

5. The petitioners timely filed their request for judicial review of the Savings Institution Division's denial of their Petition for Contested Case Hearing and Request for Hearing.

6. The petitioners were entitled to a contested case hearing on the merits of their Petition for Contested Case Hearing and the Savings Institution Division's denial of petitioner's Petition for Contested Case Hearing and Request for Hearing was in violation of the N.C. Administrative Procedures Act, Chapter 150B.

Based upon the conclusions of law, the trial court reversed respondent's denial of petitioners' petition for a contested case hearing and remanded the action to respondent to "hold a contested case hearing on the merits of the claims set out in petitioner's contested case petition, including petitioner's claims regarding whether the conversion/merger met the procedural and substantive requirements of Chapter 54C of the General Statutes." Respondent and intervenors appeal.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher and Robert B. Glenn, Jr.; and Gulley and Calhoun, by Michael D. Calhoun and Wilbur P. Gulley, for petitioners appellees.

Bailey & Dixon, L.L.P., by Ralph McDonald and Denise Stanford Haskell, for respondent appellant.

Poyner & Spruill, L.L.P., by David Dreifus and Eric P. Stevens, for intervenors appellants.

ARNOLD, Chief Judge.

Respondent and intervenors have filed petitions for writs of certiorari in this Court as alternatives to their appeals in recognition that

BYERS v. N.C. SAVINGS INSTITUTIONS DIVISION

[123 N.C. App. 689 (1996)]

they may have had no right to immediately appeal the orders of the trial court. Petitioners have filed a motion to dismiss the appeals. The petitions and the motion were referred to this panel for ruling.

We first consider petitioners' motion to dismiss the appeals. Petitioners contend the orders appealed from are interlocutory, do not affect a substantial right, and are therefore not immediately appealable. Generally, there is no right to appeal from an interlocutory order. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). However, an interlocutory order may be appealed prior to final judgment if it affects a substantial right that would be "lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987).

Respondent and intervenors have appealed from two orders. The order entered 2 March 1995 denied respondent's motion to dismiss the petitioners' request for judicial review based upon lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and lack of personal jurisdiction. The order entered 31 October 1995 remanded the case for hearing before respondent.

An order denying a motion to dismiss for lack of subject matter jurisdiction does not affect a substantial right and is therefore not appealable prior to final judgment. *Burlington Industries, Inc. v. Richmond County*, 90 N.C. App. 577, 579, 369 S.E.2d 119, 121 (1988). Likewise, an order denying a motion to dismiss for failure to state a claim upon which relief can be granted does not affect a substantial right and is not appealable prior to final judgment. *Id.*

An order denying a motion to dismiss for lack of personal jurisdiction is ordinarily appealable prior to final judgment. *Coastal Chemical Corp. v. Guardian Industries*, 63 N.C. App. 176, 178, 303 S.E.2d 642, 644 (1983). However, such an order is not immediately appealable when the question is not one of the authority of the trial court to exercise jurisdiction over the person but instead is a question of whether the jurisdictional prerequisites of the Administrative Procedure Act have been met. *Poret v. State Personnel Comm.*, 74 N.C. App. 536, 540, 328 S.E.2d 880, 882, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 491 (1985), *overruled on other grounds by Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990). In this case, the trial court clearly had the authority to exercise jurisdiction because the State of North Carolina has consented to the supervisory jurisdiction by the General Court of

EVANS v. YOUNG-HINKLE CORP.

[123 N.C. App. 693 (1996)]

Justice over appeals from administrative agencies. *See id.* The question presented by the appeals is not one of the authority of the trial court to exercise jurisdiction but is actually a question of whether there is ripeness of the subject matter of the administrative decision for judicial review. Therefore, the order is not immediately appealable on the issue of personal jurisdiction.

Because respondent and intervenors could not appeal from the trial court's 2 March 1995 order prior to final judgment, the question is whether the order entered 31 October 1995 was final or otherwise appealable. An order of the trial court remanding an action to an agency for hearing is interlocutory because it directs further action prior to a final decree. *Id.* at 538, 328 S.E.2d at 882; *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983). Furthermore, such an order is not immediately appealable because avoidance of a hearing does not affect a substantial right. *Id.*

Respondent and intervenors had no right to appeal from the trial court's orders. Furthermore, they have failed to show any compelling reason why their petitions for writs of certiorari should be granted. For these reasons, the motion to dismiss the appeals is allowed and the petitions for writs of certiorari are denied.

Dismissed.

Judges GREENE and JOHN concur.



CLAUDETTE EVANS (NOW HINNANT), EMPLOYEE-PLAINTIFF v. YOUNG-HINKLE CORPORATION, EMPLOYER-DEFENDANT, SELF-INSURED (ASSOCIATED RISK SERVICES CORPORATION, ADMINISTERING AGENT)

No. COA95-987

(Filed 3 September 1996)

1. Workers' Compensation § 372 (NCI4th)— ex parte communication with plaintiff's treating physician—error

The Industrial Commission committed reversible error by denying plaintiff's motion for an order prohibiting the ex parte contact between defense counsel and plaintiff's treating physician. Therefore, the deposition testimony of the physician was improperly admitted.

EVANS v. YOUNG-HINKLE CORP.

[123 N.C. App. 693 (1996)]

Am Jur 2d, Witnesses § 470.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege. 21 ALR3d 912.

Propriety of ex parte communication made in connection with administrative proceeding by interested party or by member or employee of agency (5 USCS § 557(B)(1)). 58 ALR Fed. 834.

2. Workers' Compensation § 471 (NCI4th)— award of attorney fees to defendant—error

The Industrial Commission erred in ordering that defendant's costs and attorney's fees be paid by plaintiff's counsel, since N.C.G.S. § 97-88.1 provides that costs may be assessed against a party, not his counsel; however, plaintiff's claim was not based on unfounded litigiousness where she sought compensation for disability to her hand in addition to compensation she had already received for disability to her finger, and the awarding of attorney's fees was unwarranted.

Am Jur 2d, Attorneys at Law § 48; Pleading § 26.

Disciplinary proceedings against an attorney predicated upon malicious prosecution or similar tort action. 52 ALR2d 1217.

Attorney's liability for abuse of process. 46 ALR4th 249.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 28 April 1995. Heard in the Court of Appeals 24 April 1996.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Paige E. Williams, for defendant-appellee.

LEWIS, Judge.

Plaintiff Claudette Evans (now and hereinafter "Hinnant") appeals from an Opinion and Award of the North Carolina Industrial Commission (hereinafter "Commission").

EVANS v. YOUNG-HINKLE CORP.

[123 N.C. App. 693 (1996)]

While employed with defendant Young Hinkle Corporation plaintiff suffered a compensable injury arising out of and in the course of her employment. Defendant accepted the claim and agreed to pay temporary total disability from 7 February through 8 April 1990 pursuant to a Form 21 Agreement which was approved by the Commission on 28 August 1990. Defendant further agreed to pay plaintiff ten (10) weeks compensation for a twenty-five percent (25%) permanent partial loss to the second finger (long finger) pursuant to N.C. Gen. Stat. section 97-31(3) in a Form 26 Agreement approved by the Commission on 12 September 1990.

On 2 April 1992, plaintiff filed a Form 33 Request for Hearing seeking additional compensation for permanent partial loss to her hand pursuant to N.C. Gen. Stat. section 97-31(12). Defendant opposed this request and filed a motion requesting costs and attorney's fees. By letter dated 23 October 1992, plaintiff moved for an order prohibiting defense counsel's ex parte contact with plaintiff's treating physician. Deputy Commissioner William L. Haigh denied this request by order filed 2 November 1992.

On 15 January 1993, Deputy Commissioner Haigh filed an Opinion and Award denying plaintiff's claim for additional compensation for loss to the hand and awarding attorney's fees and costs against plaintiff's counsel. In addition, Deputy Commissioner Haigh set aside the Form 26 Agreement pursuant to N.C. Gen. Stat. section 97-17 upon a finding of mutual mistake. On 30 March 1993, plaintiff filed a Form 44 application for Full Commission review. The Full Commission adopted the Deputy Commissioner's decision on 28 April 1995. Plaintiff appeals.

On appeal, plaintiff contends the Commission erred by: (1) denying her 23 October 1992 motion to preclude defendant's ex parte contact with her treating physician; (2) setting aside the Form 26 Agreement; (3) denying her request for additional compensation; and (4) awarding attorney's fees and costs against her attorney.

[1] We first consider plaintiff's assertion that the Commission erred by denying her motion to preclude defense counsel's ex parte contact with plaintiff's treating physician. In *Crist v. Moffat*, 326 N.C. 326, 389 S.E.2d 41 (1990), our Supreme Court held, in a medical malpractice case, that defense counsel may not interview plaintiff's treating physician privately without the plaintiff's express consent. *Id.* at 336, 389 S.E.2d at 47. In *Salaam v. N. C. Dept. of Transportation*, 122 N.C.

EVANS v. YOUNG-HINKLE CORP.

[123 N.C. App. 693 (1996)]

App. 83, 468 S.E.2d 536, *disc. review allowed*, 343 N.C. 514, 472 S.E.2d 20 (1996), we applied *Crist* in the worker's compensation context and held that the Commission erred when it admitted a doctor's deposition testimony taken after defense counsel engaged in ex parte contact with the plaintiff's physician without the consent of plaintiff's counsel. *Id.* at 88, 468 S.E.2d at 539.

In *Salaam*, we further held that admission of testimony given after this type of ex parte contact occurred is reversible error in spite of any opportunities the plaintiff's attorney had to cure the resulting prejudice. *Id.* In accordance with *Salaam*, we therefore conclude that the Commission committed reversible error by denying plaintiff's motion for an order prohibiting the ex parte contact between the defense counsel and the plaintiff's treating physician. Pursuant to *Salaam*, as Dr. Naso's deposition testimony followed and was tainted by the improper contact, we remand this case to the Commission to strike this testimony, to reopen the case to receive further evidence, and to reconsider plaintiff's claim for additional compensation.

[2] We now consider the allegation that the Commission erred in ordering that defendant's costs and attorney's fees be paid by plaintiff's counsel. Where a hearing is brought, prosecuted or defended without reasonable ground, N.C. Gen. Stat. section 97-88.1 provides the Commission with the authority to assess the whole cost of the proceedings, including attorney's fees, upon the party who has brought or defended the proceeding. It states that the Commission may assess such costs (including attorney's fees) "upon a *party*. . . ." N.C. Gen. Stat. § 97-88.1 (1991) (emphasis added). The statutory language does not expressly provide the Commission with the authority to assess these costs and fees against a party's counsel.

In *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992), our Supreme Court found that the language of N.C. Gen. Stat. section 6-21.5 refers in every instance to the *party* with no hint of including the attorney. *Id.* at 665-666, 412 S.E.2d at 338-339 (emphasis added). In *Bryson*, the Court held that " 'because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, N.C. Gen. Stat. § 6-21.5 must be strictly construed' " and therefore the statute does not authorize the Court to require counsel to pay attorney's fees to the prevailing party. *Id.* (quoting *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991)). We conclude that the same considerations stated in *Bryson* are applicable to G.S. section 97-88.1, the statutory provision at issue here.

EVANS v. YOUNG-HINKLE CORP.

[123 N.C. App. 693 (1996)]

Furthermore, G.S. section 97-88.1 reads in pertinent part: "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." G.S. § 97-88.1 (1991). In *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982), we established a test to determine whether attorney's fees should be awarded in a hearing brought before the Industrial Commission. In *Sparks*, we stated: "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Id.* at 665, 286 S.E.2d at 576. In *Robinson v. J.P. Stephens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982), we stated that this Court has the right to review whether the evidence shows a reasonable ground to defend. *Id.* at 627, 292 S.E.2d at 149. In her claim, plaintiff asserts that she is entitled to compensation under G.S. section 97-31(12) for disability to her hand *in addition to* compensation she has already received for disability to her second (long) finger under G.S. Section 97-31(3). Considering the evidence presented, we find that the claim is not based on unfounded litigiousness and therefore conclude that the awarding of attorney's fees is unwarranted.

Given the disposition of this case, we do not address plaintiff's other assignments of error. We reverse the Opinion and Award filed 28 April 1995 and remand this case to the Commission with directions to strike the deposition testimony of Dr. Stephen J. Naso, Jr., reverse the award of attorney's fees and costs against plaintiff's attorney, reopen the case to receive further evidence and reconsider plaintiff's request for additional compensation.

Reversed and remanded.

Judges EAGLES and MCGEE concur.

STATE v. TALBOT

[123 N.C. App. 698 (1996)]

STATE OF NORTH CAROLINA v. SCOTT ROBERT TALBOT

No. COA95-944

(Filed 3 September 1996)

Husband and Wife § 46 (NCI4th)— abandonment by supporting spouse—sufficiency of evidence

The evidence was sufficient to permit a reasonable juror to conclude that defendant intentionally abandoned his wife where it tended to show that on 6 October defendant left the marital residence taking with him some belongings; on 7 October defendant returned to gather his remaining things; at no time did he leave any money for his wife's support; and these events occurred before the wife sought a domestic violence order which ordered defendant to stay away from the marital residence for one year. Furthermore, the jury could draw a reasonable inference from the wife's testimony that defendant's affirmative acts of cruelty constituted constructive abandonment. N.C.G.S. § 14-322(b).

Am Jur 2d, Divorce and Separation §§ 100, 122, 141, 286.

Sufficiency of allegations of desertion, abandonment, or living apart as ground for divorce, separation, or alimony. 57 ALR2d 468.

Appeal by defendant from judgment entered 10 May 1995 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 19 August 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Victoria L. Voight, for the State.

Assistant Public Defender Stephen M. Hagen for defendant-appellant.

MARTIN, John C., Judge.

Defendant appeals from a judgment imposing a suspended sentence upon his conviction by a jury of abandonment by a supporting spouse in violation of G.S. § 14-322(b). He assigns error to the trial court's denial of his motion to dismiss at the close of the State's evidence and at the close of all the evidence. At trial, the evidence

STATE v. TALBOT

[123 N.C. App. 698 (1996)]

tended to establish that in July of 1993 defendant married Kelly Clark Talbot, the prosecuting witness. At all relevant times, Ms. Talbot was a full-time student, and defendant was the supporting spouse. Ms. Talbot testified that throughout their marriage, defendant had been physically abusive toward her. On 6 October 1994 defendant and his wife had a domestic dispute culminating in Ms. Talbot's seeking shelter at a neighbor's home. When Ms. Talbot returned to the marital residence, she discovered that defendant had left and taken some of his belongings. On 7 October, defendant returned to the residence to retrieve his remaining belongings. Ms. Talbot testified that at this time another confrontation occurred wherein defendant pushed her to the ground and struck her repeatedly until "a neighbor came out and told him to get off [her]." Ms. Talbot testified that on 7 October she sought and obtained an assault warrant and a Domestic Violence Order (DVO) forbidding defendant from returning to the marital residence. Ms. Talbot left the residence for a few days until she thought that defendant had been served with the warrant and DVO. Ms. Talbot testified that upon returning to the residence, she discovered that defendant had taken the remainder of his belongings, unplugged the refrigerator causing the food to spoil, disconnected their telephone, and left her no money. Further testimony established that defendant had paid none of the couples' bills which he had done prior to 7 October, and that, as a full-time student, Ms. Talbot was left with no income. After a hearing, the trial court filed a Domestic Violence Protective Order on 18 October 1994 ordering defendant to stay away from the marital residence for one year.

Defendant asserts that his motion to dismiss should have been granted because, due to the DVO, his abandonment was not willful and that Ms. Talbot's seeking the DVO amounted to consent on her part to his departure from the residence. Therefore, he argues, the State could not meet its evidentiary burden to submit the issue to the jury. We reject his argument.

The standard of review in ruling on a motion to dismiss based on insufficiency of the evidence is whether, viewed in the light most favorable to the State, there is substantial evidence of the elements of the offense. *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986); *State v. Jones*, 110 N.C. App. 169, 429 S.E.2d 597 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990).

STATE v. TALBOT

[123 N.C. App. 698 (1996)]

Viewed in the light most favorable to the State, the evidence in this case is sufficient to permit a reasonable juror to conclude that defendant intentionally abandoned his wife. Evidence presented at trial tended to show that on 6 October defendant left the marital residence taking with him some belongings. On 7 October defendant returned to the residence to gather his remaining things; at no time did he leave any money for his wife's support. Ms. Talbot testified that these events occurred before she sought the DVO.

Moreover, there is also substantial evidence which would allow a reasonable juror to conclude that defendant constructively abandoned Ms. Talbot prior to entry of the DVO. Constructive abandonment by the defaulting spouse may consist of affirmative acts of cruelty. *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 362 S.E.2d 584 (1987).

When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, not hers.

Eggleston v. Eggleston, 228 N.C. 668, 679, 47 S.E.2d 243, 250 (1948).

Ms. Talbot testified that during a domestic dispute on 6 October 1994, defendant became violent and started "throwing stuff around the house" and, that on 7 October 1994, defendant became physically violent when he returned home to gather the remainder of his belongings. Ms. Talbot also testified that defendant had previously subjected her to physical abuse. We believe the jury could draw a reasonable inference from Ms. Talbot's testimony that defendant's actions constituted a constructive abandonment of his wife by rendering it impossible for her to continue living with defendant.

Defendant further contends that there can be no abandonment where Ms. Talbot, by seeking the DVO, consented to his departure. The rule in civil actions is that where consent to separation is induced by the misconduct of one spouse, a charge of voluntary abandonment may still be maintained. *Sauls v. Sauls*, 25 N.C. App. 468, 213 S.E.2d 425, *affirmed in relevant part*, 288 N.C. 387, 218 S.E.2d 338 (1975). We hold this rule to be applicable in the current context as well. Based on Ms. Talbot's accounts of defendant's sometimes violent and abusive nature, the evidence was sufficient to permit the conclusion that defendant's misconduct caused his wife to obtain the DVO due to her fear of further abuse.

ALLEN v. EFIRD

[123 N.C. App. 701 (1996)]

Because there was substantial evidence that defendant abandoned his wife prior to the DVO, and that his misconduct caused her to obtain the order, the trial court correctly denied defendant's motion to dismiss.

No error.

Chief Judge ARNOLD and Judge SMITH concur.

GEORGE ALLEN, JR., PLAINTIFF V. CLYDE HEATH EFIRD, III, AND LEAH KARON
EFIRD, DEFENDANTS

No. COA95-807

(Filed 3 September 1996)

**Automobiles and Other Vehicles § 766 (NCI4th)— wet roads—
hydroplaning vehicle—sudden emergency—instruction
improper**

The trial court erred in instructing the jury on the sudden emergency doctrine where defendant had been proceeding on wet roads for some time prior to the accident; he applied brakes when he saw a school bus; he hydroplaned, lost control of his car, and hit plaintiff's vehicle; and if defendant thus was confronted with a sudden emergency, he contributed to that emergency by failing to maintain a proper lookout or speed in light of the roadway conditions at that time.

**Am Jur 2d, Federal Tort Claims Act § 97; Negligence
§§ 213, 1214.**

**Sudden emergency as exception to rule requiring
motorist to maintain ability to stop within assured clear
distance ahead. 75 ALR3d 327.**

**Modern status of sudden emergency doctrine. 10
ALR5th 680.**

**Instructions on "unavoidable accident," "mere acci-
dent," or the like, in motor vehicle cases—modern cases.
21 ALR5th 82.**

ALLEN v. EFIRD

[123 N.C. App. 701 (1996)]

Appeal by plaintiff from judgment entered 20 January 1994 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 14 May 1996.

On 4 May 1988, defendant Clyde H. Efird, III, ("defendant") drove his vehicle northbound on Birch Bridge Road. As defendant approached a curve, defendant saw a school bus in the oncoming lane of traffic. Defendant testified that he then tried to slow down but the roadway was wet and he hydroplaned losing control of his car in the process. Defendant spun off the road on the right, then came back across the road and missed the school bus but struck plaintiff's vehicle in the oncoming lane of traffic.

Plaintiff filed his complaint on 29 March 1993, and the cause proceeded to trial on 16 January 1995. At trial, the court submitted to the jury the issue of whether the plaintiff was injured by the negligence of defendant Clyde Efird. Pursuant to defendant's request, the trial court also instructed the jury on the doctrine of sudden emergency. Thereafter, the jury returned a general verdict finding that plaintiff was not injured as a result of defendant's negligence.

Plaintiff appeals.

Alexander Dawson, P.A., by Alexander Dawson, and Hemric & Lambeth, P.A., by H. Clay Hemric, Jr., for plaintiff-appellant.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendant-appellees.

EAGLES, Judge.

The sole issue before us is whether the trial court erred in instructing the jury on the doctrine of sudden emergency. At trial, plaintiff argued that defendant Clyde Efird was negligent *per se* based on his being left of the center line when the accident occurred. Defendant sought an instruction on the doctrine of sudden emergency asserting that he was not negligent in being on the wrong side of the road because he acted reasonably when faced with the sudden emergency of unexpectedly hydroplaning. The trial court agreed and accordingly instructed the jury on the doctrine of sudden emergency.

Plaintiff argues that the trial court's instruction was erroneous because any emergency encountered by defendant was created in part by defendant's own failure to properly control his vehicle. We agree.

ALLEN v. EFIRD

[123 N.C. App. 701 (1996)]

Two conditions must be met before the doctrine of sudden emergency may be applied: (1) "an emergency situation must exist requiring immediate action to avoid injury . . .," and (2) "the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Conner v. Continental Industrial Chemicals, Inc.*, 123 N.C. App. 70, 73, 472 S.E.2d 176, 179 (1996). In the instant case, defendant unexpectedly hydroplaned as he approached a curve opposite an oncoming school bus. The investigating officer testified and defendant agreed that the road remained wet at the time of the accident, although the actual rainfall had recently subsided. The investigating officer identified no defects in the roadway.

"As a general rule, every motorist driving upon the highways of this [S]tate is bound to a minimal duty of care to keep a reasonable and proper lookout in the direction of travel and see what he ought to see." *Keith v. Polier*, 109 N.C. App. 94, 99, 425 S.E.2d 723, 726 (1993). In other words, a person may lose control of his vehicle responding to a sudden emergency, but a defendant may not assert the sudden emergency doctrine as a defense where the sudden emergency was caused, at least in part, by defendant's negligence in failing to maintain the proper lookout or speed in light of the roadway conditions at the time. *E.g., Masciulli v. Tucker*, 82 N.C. App. 200, 206, 346 S.E.2d 305, 309 (1986); *White v. Greer*, 55 N.C. App. 450, 454, 285 S.E.2d 848, 851-52 (1982). Based on this standard, we conclude that the evidence here is insufficient to support an instruction on the sudden emergency doctrine.

A reasonable driver understands that traction is greatly reduced on wet roads and that the wetness of the roadway introduces a certain variable element into the driving equation. Standing alone, evidence that a driver was able to proceed without incident for some time under adverse conditions does not warrant a sudden emergency instruction just because there is evidence that the driver later unexpectedly lost control due to those same adverse conditions. *See, e.g., Holbrook v. Henley*, 118 N.C. App. 151, 154-56, 454 S.E.2d 676, 678-79 (1995). A sudden emergency instruction is improper absent evidence of a sudden and unforeseeable change in conditions to which the driver must respond to avoid injury. *E.g., Colvin v. Badgett*, 120 N.C. App. 810, 812, 463 S.E.2d 778, 780 (1995), *aff'd*, 343 N.C. 300, 469 S.E.2d 553 (1996); *Polier*, 109 N.C. App. at 99, 425 S.E.2d at 726-27.

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

Here, defendant had been proceeding on wet roads for some time prior to the accident, and defendant makes no assertion that there was any unexpected change in condition for the worse immediately prior to his loss of control. Defendant presents no evidence of a "sudden downpour or sudden change of driving conditions . . .," *Masciulli*, 82 N.C. App. at 207, 346 S.E.2d at 309, or of "any road condition or highway exigency . . ." arising that he could not have avoided through the exercise of due care. *Weston v. Daniels*, 114 N.C. App. 418, 422, 442 S.E.2d 69, 72, *disc. review denied*, 336 N.C. 785, 447 S.E.2d 433 (1994). The mere fact that defendant lost control under static conditions does not merit a sudden emergency instruction. See, e.g., *Holbrook*, 118 N.C. App. at 154-55, 454 S.E.2d at 678-79. Accordingly, we conclude that the trial court erred in instructing the jury on the sudden emergency doctrine and we reverse the judgment of the trial court and remand the cause for a new trial.

New trial.

Judges WYNN and SMITH concur.

TOWN OF SPRUCE PINE, A MUNICIPAL CORPORATION, AND BRYANT ELECTRIC COMPANY, INC., PLAINTIFFS v. AVERY COUNTY AND AVERY COUNTY BOARD OF COMMISSIONERS, CONSISTING OF SUSAN B. PITTMAN, PHYLLIS FORBES, BILL BEUTTELL, ARLENE ELLER, TOMMY BURLESON, INDIVIDUALLY, DEFENDANTS v. THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, THE DIVISION OF ENVIRONMENTAL MANAGEMENT OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES; AND THE DIVISION OF ENVIRONMENTAL HEALTH OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, ADDITIONAL DEFENDANTS

No. COA95-639

(Filed 17 September 1996)

1. Appeal and Error § 443 (NCI4th)— delegation of legislative power—constitutionality—standing to challenge—raised by Court of Appeals

Although the issue of standing to contest the Water Supply Watershed Protection Act as an unconstitutional delegation of legislative power was not presented by the State agencies, stand-

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

ing is a question of subject matter jurisdiction which may be raised on the Court's own motion. N.C.G.S. § 143-214.5; N.C.G.S. § 143-214.6; N.C.G.S. § 143-215.6(a).

Am Jur 2d, Constitutional Law §§ 150-152, 350.

Supreme Court's views as to party's standing to assert rights of third persons (jus tertii) in challenging constitutionality of legislation. 40 L. Ed. 2d 902.

2. Constitutional Law § 49 (NCI4th)— delegation of legislative power—standing to challenge

The County had standing to contest the constitutionality of the Water Supply Watershed Protection Act as an unconstitutional delegation of legislative power. For standing in a declaratory judgment action, there must be a present, actual controversy at the time the pleading requesting declaratory relief is filed. Here there was a present, actual controversy when the County's cross-claim for a declaratory judgment was filed since it was asserted as a defensive maneuver in the midst of litigation.

Am Jur 2d, Constitutional Law § 198.

Supreme Court's views as to party's standing to assert rights of third persons (jus tertii) in challenging constitutionality of legislation. 40 L. Ed. 2d 902.

3. Environmental Protection, Regulation, and Conservation § 67 (NCI4th); Constitutional Law § 32 (NCI4th)— Water Supply Watershed Protection Act—unconstitutional delegation of legislative power

Summary judgment should have been granted for the County on its cross-claim against the State agencies for a declaratory judgment that the Water Supply Watershed Protection Act is an unconstitutional delegation of legislative power in violation of Article I, section 6 and Article II, section 1 of the North Carolina Constitution. Although the procedural safeguards of the North Carolina Administrative Procedure Act are adequate, the WSWPA lacks meaningful guiding standards in that it contains a policy statement but no findings and conclusions and the policy statement fails to give any meaningful guidance as to how it should be implemented. The WSPA also fails to define key terms. Absent standards, applicable procedural safeguards alone are not enough.

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

Am Jur 2d, Administrative Law § 56.**Supreme Court's views as to whether federal statute unconstitutionally delegates Congress' power. 104 L. Ed. 2d 1099.**

Judge GREENE dissenting.

Appeal by defendants from judgment entered 23 June 1994 by Judge Lacy H. Thornburg in Avery County Superior Court and from judgment entered 1 February 1995 by Judge Melzer A. Morgan, Jr. in Caldwell County Superior Court. Heard in the Court of Appeals 28 February 1996.

Wyatt Early Harris & Wheeler, L.L.P., by Thomas E. Terrell, Jr.; and Lloyd Hise, Jr. for plaintiffs-appellees.

Ronald W. Howell, P.A., by Ronald W. Howell; and Joseph W. Seegers, for defendants-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General Daniel F. McLawhorn, Special Deputy Attorney General Kathryn Jones Cooper, and Assistant Attorney General Sarah Y. Meacham, for additional defendants-appellees.

LEWIS, Judge.

This appeal requires us to determine the constitutionality of the Water Supply Watershed Protection Act, 1989 N.C. Sess. Laws ch. 426 (codified at N.C. Gen. Stat. sections 143-214.5 and 143-214.6 and amending N.C. Gen. Stat. sections 143-215.2(a) and 143-215.6(a)) (1993) ("WSWPA").

This case had its genesis on 19 March 1993 when an Avery County building inspector refused to grant the Town of Spruce Pine in Mitchell County ("Town") and its contractor, Bryant Electric Company, a building permit to construct a water supply intake in a North Toe River watershed in Avery County. The Town appealed to the Avery County Board of Commissioners which denied the building permit on 9 August 1993. The Town had previously considered placing its intake in Mitchell County, but for various reasons chose to place the intake in Avery County. Placement of the intake in a Avery County watershed triggered the application of the WSWPA and rules promulgated thereunder by the Environmental Management Commission.

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

The WSWPA was enacted as an amendment to Article 21 of Chapter 143 of the General Statutes. *See* 1989 N.C. Sess. Laws ch. 426, § 1. Article 21 provides for conservation of our State's water and air resources, *see* N.C. Gen. Stat. section 143-211, and contains statutory provisions that require the Environmental Management Commission ("Commission"), a state agency, to adopt rules implementing these provisions. *See* N.C. Gen. Stat. §§ 143-211 to 143-215.74I (1993). N.C. Gen. Stat. sections 143-214.1 and 143-215.3(a)(1), statutes enacted prior to the WSWPA, require the Commission to classify the waters of the State and to adopt standards appropriate to each classification so as to promote the policies of Article 21 of Chapter 143 of the General Statutes. The Commission has so classified the State's waters in rules found in N.C. Admin. Code tit. 15A, subchapter 2B.

In 1989, the General Assembly enacted the WSWPA in an effort to protect the State's water supply watersheds through imposition of statewide minimum protection requirements. *See* 1989 N.C. Sess. Laws ch. 426. The WSWPA institutes "a cooperative program of water supply watershed management and protection to be administered by local governments consistent with minimum statewide management requirements established by the Commission." G.S. § 143-214.5(a). The WSWPA requires the Commission to adopt rules "for the classification of" the States' water supply watersheds and "that establish minimum statewide water supply watershed protection requirements applicable to each classification to protect surface water supplies" G.S. § 143-214.5(b).

The WSWPA also permits the Commission to designate certain water supply watersheds or portions thereof as "critical water supply watersheds" and to impose management requirements for these watersheds that are stricter than the minimum statewide requirements. *Id.* The WSWPA further provides that the Commission may reclassify water supply watersheds "as necessary to protect future water supplies or improve protection at existing water supplies." G.S. § 143-214.5(c). The WSWPA creates the Watershed Protection Advisory Council, acting in an advisory capacity, to assist the Commission and the Secretary of the Department of Environment, Health, and Natural Resources in development of the necessary rules and to perform certain other functions deemed appropriate by the Secretary or by the Council itself. G.S. § 143-214.6.

The WSWPA requires local governments to develop water supply watershed protection programs that include a local ordinance

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

enforcing the minimum statewide management requirements. G.S. § 143-214.5(d). If a local government fails to adopt a complying program, the WSWPA authorizes the Commission to assume responsibility for development and implementation of the local program. G.S. § 143-214.5(e). The WSWPA also authorizes the Commission to take enforcement action against any person who violates a minimum statewide water supply watershed management requirement. G.S. § 143-214.5(f). A local government that fails to adopt the required local program or willfully fails to administer or enforce its program in substantial compliance with the statewide minimum requirements is subject to civil penalties. G.S. § 143-214.5(g). Civil penalties may also be assessed, in areas not covered by an approved local program, against any person who violates the minimum statewide requirements or critical water supply requirements adopted by the Commission. *Id.*

The WSWPA required the Commission to adopt the water supply watershed classifications and applicable management requirements by 1 January 1991 and to complete the classification of all existing water supply watersheds by 1 July 1992. 1989 N.C. Sess. Laws ch. 426, § 5, as amended by 1989 N.C. Sess. Laws ch. 1004, §§ 15, 16, 1989 N.C. Sess. Laws ch. 1024, § 1, and 1991 N.C. Sess. Laws ch. 471, § 1. In accordance with these deadlines, the Commission reclassified over 200 surface water supplies and enacted water supply protection rules effective 3 August 1992.

In 1988, the Town asked the Commission to reclassify the North Toe River, from its headwaters in Avery County to Cathis Creek in Mitchell County, from Class C and C Trout to WS-III and WS-III Trout to reflect its proposed use as a water supply. On 1 January 1990, this section of the North Toe River was reclassified in accordance with then existing statutes and rules. In 1992, the North Toe River Watershed was reclassified WS-III pursuant to the watershed protection rules newly adopted under the WSWPA. This reclassification involved reclassification of the watershed, not just the stream, and included the point of intake upstream of the entire watershed and every stream that drains into it. Pursuant to the requirements of 1995 N.C. Sess. Laws ch. 301, *see* 1995 N.C. Adv. Legis. Serv. 471, the North Toe River water supply watershed has since been reclassified as WS-IV. This reclassification was effective 1 October 1995.

Pursuant to rules that implement the WSWPA, freshwater watersheds are classified as WS-I, WS-II, WS-III, WS-IV, or WS-V with WS-I

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

being the most protective and WS-V the least protective classification. The WS-III classification, as assigned to the North Toe River water supply watershed in 1992, applies to water supplies which are generally in low to moderately developed watersheds. A WS-IV classification, now currently assigned to the North Toe River water supply watershed, applies to water supplies which are generally in moderately to highly developed watersheds. *See* N.C. Admin. Code tit. 15A, r. 2B.0101, 2B.0211 to 2B.0218 (setting out these classifications and applicable standards).

On 30 July 1993, plaintiffs filed a complaint against defendant Avery County and its Board of Commissioners (hereinafter collectively "County"). On 13 August 1993, the County filed an answer, counterclaim, and a proposed cross-claim against the Commission, and the Division of Environmental Health and the Division of Environmental Management in the Department of Environment, Health and Natural Resources (collectively "the State agencies"). In its counterclaim, the County alleged, *inter alia*, that the Town's selection of an Avery County site for its intake was arbitrary and capricious. By order entered 18 August 1993, Judge Forrest Ferrell allowed the County's motion to add the State agencies as additional defendants. On 18 August 1993, the County filed an amended answer, counterclaim and a cross-claim against the State agencies. By order entered 8 March 1994, the court permitted the County to amend its pleadings again. These amended pleadings were answered by plaintiffs and by the State agencies.

All parties moved for summary judgment on some or all of the claims. By order entered 23 June 1994 in Avery County Superior Court, Judge Lacy H. Thornburg denied plaintiffs' and the County's motions for summary judgment and granted that of the State agencies. By order entered 20 September 1994, the case was transferred to Caldwell County for trial on the only remaining claim, the County's counterclaim against plaintiffs.

After a mistrial, Judge Melzer Morgan, Jr. entered an order on 1 February 1995 granting plaintiffs' renewed motion for directed verdict on the County's counterclaim. The County appeals from this order and from the 23 June 1994 order granting summary judgment to the State agencies on its cross-claim.

In support of its second assignment of error, the County asserts that the trial court erred in directing a verdict against it on its counterclaim against plaintiffs. In its brief, the County asserts that the trial

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

court erred in declining to submit to a jury the issue of whether plaintiffs' selection of the Avery County site for their water intake was arbitrary and capricious.

Attorneys of record for the County have informed this Court in an Appeal Information Statement that this assignment of error is now moot because the County has agreed to permit plaintiffs to draw water from the Avery County site. Attached to the AIS is a 25 September 1995 letter from the Avery County Board of Commissioners to the County's attorney of record directing that this assignment of error not be pursued.

A case should be dismissed as moot when, in the course of litigation, "it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). We dismiss the County's second assignment of error as moot.

[1] In its first assignment of error, the County asserts that the trial court erred by ruling that the WSWPA is constitutional in its order granting summary judgment to the State agencies on the County's crossclaim.

We first examine the State agencies' contention that the County does not have standing to challenge the constitutionality of the WSWPA. The State agencies have not presented this issue by cross-assignment of error or by cross-appeal. However, since standing is a question of subject-matter jurisdiction, we may raise the issue on our own motion. *Union Grove Milling and Manufacturing Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478, *aff'd*, 335 N.C. 165, 436 S.E.2d 131 (1993).

[2] The State agencies rely on *In re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974). In *Martin*, our Supreme Court held that a county did not have standing to challenge the constitutionality of a statute which granted tax exemptions to certain personal property. *Id.* at 76, 209 S.E.2d at 773. *Martin* is distinguishable. There, the constitutional issue was not raised by a declaratory judgment action but in an appeal from an administrative decision. A declaratory judgment action is a proper method to question the constitutionality of a statute. *In re Appeal of Moravian Home, Inc.*, 95 N.C. App. 324, 330, 382 S.E.2d 772, 776, *disc. review denied and appeal dismissed*, 325 N.C. 707, 388 S.E.2d 457 (1989).

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

N.C. Gen. Stat. section 1-254 (1983) authorizes any "person" whose "rights, status or other legal relations are affected by a statute" to bring a declaratory judgment action. N.C. Gen. Stat. section 1-265 (1983) provides that the word "person" means "any person, . . . or municipal corporation or other corporation of any character whatsoever" (emphasis added). Both cities and counties are given corporate powers by statute. See N.C. Gen. Stat. § 153A-11 (1991) (counties); N.C. Gen. Stat. § 160A-11 (1994). As it has corporate powers under G.S. section 1-265, we conclude that the County is a "person" under G.S. section 1-254.

Since *Martin*, our Supreme Court has held that a municipality has standing to bring a declaratory judgment action to challenge the constitutionality of a statute which affects its rights or status. *E.g.*, *City of New Bern v. New Bern-Craven Co. Bd. of Ed.*, 328 N.C. 557, 559-60, 402 S.E.2d 623, 625 (1991); *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 645-46, 360 S.E.2d 756, 760 (1987). We see no meaningful difference between a city and a county in this context. The WSWPA changes the County's rights and status by requiring it to enact and enforce water supply watershed protection requirements which impose financial and administrative burdens it was not previously required to bear. We conclude that the County is entitled to challenge the constitutionality of legislation which effects this change in its rights and status.

For standing in a declaratory judgment action, there must be a present, actual controversy at the time the pleading requesting declaratory relief is filed. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986). That is, it must appear that litigation is unavoidable. *Town of Emerald Isle*, 320 N.C. at 646, 360 S.E.2d at 760. Here, there was a present, actual controversy when the County's cross-claim for a declaratory judgment was filed since it was asserted as a defensive maneuver in the midst of litigation.

For the above reasons, we hold that the County has standing to challenge the constitutionality of the WSWPA.

[3] The dispositive issue in this appeal is whether the WSWPA is an unconstitutional delegation of legislative power to an administrative agency, in this case, the Commission.

Article II, section 1 of the North Carolina Constitution vests legislative power in the General Assembly. N.C. Const. art. II, § 1. Article 1, section 6 of the Constitution provides that the three branches of

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

government, legislative, executive, and judicial, "shall be forever separate and distinct from each other." N.C. Const. art I, § 6. Our Supreme Court has gleaned from these provisions "the bedrock principle 'that the legislature may not abdicate its power to make laws or delegate its *supreme* legislative power to any coordinate branch or to any agency which it may create.'" *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978) (quoting *Turnpike Authority v. Pine Island*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965)). Some delegation is inescapable. What and how much are the questions we must answer.

In *Adams*, our Supreme Court set forth the contours of this principle, commonly known as the non-delegation doctrine. Under this doctrine, a legislature may delegate a limited portion of its legislative powers to administrative agencies so that these agencies may exercise their expertise in complex matters with which a legislative body cannot deal directly. *Adams*, 295 N.C. at 697, 249 S.E.2d at 410. However, " 'such transfers of power should be closely monitored' " to insure that agency decision-making is not " 'arbitrary and unreasoned' " and that " 'the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature.' " *Id.* at 697-98, 249 S.E.2d at 411 (quoting Peter G. Glenn, *The Coastal Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. Rev. 303, 315 (1974)).

When called upon to do so, our appellate courts have closely monitored legislative delegations and have held them unconstitutional when these principles have been violated. *E.g. Northampton County Drainage District Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990); *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 206 S.E.2d 141 (1974); *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960); *Harvell v. Scheidt, Comr. of Motor Vehicles*, 249 N.C. 699, 107 S.E.2d 549 (1959); *Taylor v. Racing Asso.*, 241 N.C. 80, 84 S.E.2d 390 (1954); *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953); *Board of Trade v. Tobacco Co.*, 235 N.C. 737, 71 S.E.2d 21, *cert. denied*, 344 U.S. 866, 97 L. Ed. 671 (1952); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *Church v. State*, 40 N.C. App. 429, 253 S.E.2d 473 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980); *Drug Centers v. Board of Pharmacy*, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

The critical question for our determination is whether the challenged delegation is accompanied by adequate guiding standards. *See*

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

In re Community Association, 300 N.C. 267, 273, 266 S.E.2d 645, 650 (1980). If such standards are present, the delegation is constitutional. *Adams*, 295 N.C. at 697, 249 S.E.2d at 410. The primary sources for these guiding standards are “declarations by the General Assembly of the legislative goals and policies” to be applied by an agency in exercising its delegated powers. *Adams*, 295 N.C. at 698, 249 S.E.2d at 411. To be adequate, the guiding standards must be “‘as specific as the circumstances permit.’” *Id.* (quoting *Turnpike Authority*, 265 N.C. at 115, 143 S.E.2d at 323).

In *Adams*, the Court held that the Coastal Area Management Act of 1974, N.C. Gen. Stat. section 113A-100, *et. seq.* (1994) (“CAMA”), contained adequate guiding standards as expressed in the CAMA’s legislative goals and findings and in the CAMA criteria for designating Areas of Environmental Concern. *Id.* at 698-700, 249 S.E.2d at 411-12.

In stark contrast to CAMA, the WSWPA contains no findings and goals. It does contain a policy statement. However, this statement fails to give any meaningful guidance as to how it should be implemented. The WSWPA policy statement provides:

(a) Policy Statement.—This section provides for a cooperative program of water supply watershed management and protection to be administered by local governments consistent with minimum statewide management requirements established by the Commission. If a local government fails to adopt a water supply watershed protection program or does not adequately carry out its responsibility to enforce the minimum water supply watershed management requirements of its approved program, the Commission shall administer and enforce the minimum statewide requirements. The reduction of agricultural nonpoint source discharges shall be accomplished primarily through the Agriculture Cost Share Program for Nonpoint Source Pollution Control.

G.S. § 143-214.5(a).

The WSWPA directs the Commission to adopt rules

for the classification of water supply watersheds and that establish minimum statewide water supply watershed protection requirements applicable to each classification to protect surface water supplies by (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, or (iii) a combination of (i) and (ii).

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

G.S. § 143-214.5(b). Although the WSWPA designates two methods (methods (i) and (ii) above) to be used by the Commission in developing minimum statewide management requirements, it does not delineate the policy considerations that should guide the Commission in adopting these minimum requirements. It also fails to set forth any criteria for classification of watersheds.

The WSWPA further permits the Commission to designate some water supply watersheds as “critical water supply watersheds” and to impose more stringent management requirements on these watersheds. G.S. § 143-214.5(b). However, it provides no criteria for the Commission to follow in its designation of these critical water supply watersheds. *See id.* As discussed in *Adams*, 295 N.C. at 700, 249 S.E.2d at 412, such criteria are provided in the CAMA to guide the Coastal Resources Commission in its designation of Areas of Environmental Concern. *See* N.C.Gen. Stat. § 113A-113 (1994). For a comprehensive discussion of the constitutional infirmities of the WSWPA, *see* Brandon Bordeaux, Comment, *Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill*, 29 Wake Forest L. Rev. 1279 (1994).

The WSWPA also fails to define several of its key terms. The applicable definitions set forth in N.C. Gen. Stat. section 143-213 (1993) do not fill in these definitional gaps. Although the term “watershed” is defined in G.S. section 143-213(21), many other WSWPA key terms are not defined in G.S. section 143-213 or in the WSWPA. These include “water supply,” “critical water supply watershed,” and “performance-based alternatives to development density controls.” *See* G.S. § 143-214.5 (using but not defining these terms).

The State agencies assert that the General Assembly’s decision to enact the WSWPA as an amendment to Article 21 of Chapter 143 reveals its intent that the Commission implement the WSWPA (1) in light of the public policy declaration set forth in N.C. Gen. Stat. section 143-211 (1993) and (2) by use of the criteria for classification of our State waters and the criteria for setting water quality standards set forth in N.C. Gen. Stat. section 143-214.1 (1993). The State agencies contend that, when read *in pari materia* with these complementary provisions, the WSWPA is constitutional. We are not persuaded.

The general policy statement in G.S. section 143-211 declares it to be the public policy of the State “to provide for the conservation of its water and air resources” and states that “it is the intent of the General

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

Assembly,” within the context of Articles 21, 21A, and 21A of Chapter 143, “to achieve and to maintain . . . a total environment of superior quality.” G.S. § 143-211. While stating this preference for a “superior quality” environment, this policy statement also sets forth a kaleidoscope of concerns that should be addressed by water and air purity standards without delineating a preferred balance to be maintained by the implementing agency in accommodating these frequently antithetical interests, *to wit*:

. . . Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

G.S. § 143-211.

In *State ex rel. Utilities Commission v. Empire Power Co.*, 112 N.C. App. 265, 435 S.E.2d 553 (1993), *disc. review denied*, 335 N.C. 564, 441 S.E.2d 125 (1994), we addressed the constitutionality of a legislative delegation of power to the Utilities Commission. This delegation empowered the Commission to dismiss an application for a certificate of public convenience and necessity, a certificate required for construction of the proposed electric generating facility. *See id.* at 270-71, 435 S.E.2d at 555-56. In holding the delegation constitutional, we read the standard of public convenience and necessity set forth in the challenged legislation, N.C. Gen. Stat. section 62-110.1, *in pari materia* with N.C. Gen. Stat. section 62-2, a section that, at the time, set forth ten specific policies to guide the Utilities Commission in exercising its powers under Chapter 62. *Id.* at 274, 435 S.E.2d at 557.

In *Empire Power*, the policies set forth in G.S. section 62-2 complemented a specific standard in the challenged legislation, the standard of public convenience and necessity. *See id.*; Bordeaux, *supra*, at 1296-1297. In contrast, the WSWPA does not contain an analogous specific standard that may be complemented by the policies set forth in G.S. section 143-211, the section that contains the general policy statement for Article 21. Bordeaux, *supra*, at 1297. In other words, even if we read the WSWPA provisions *in pari materia* with G.S. section 143-211, the WSWPA still lacks adequate guiding standards. The

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

policy provisions in G.S. section 143-211 alone simply do not redeem the broadside policy declarations of the WSWPA.

There is also no indication in the WSWPA that the General Assembly intended for the Commission, in implementing the WSWPA, to use the more detailed criteria for classification of our State waters and the criteria for water quality standards set forth in N.C. Gen. Stat. section 143-214.1. If the General Assembly had such an intention, it could easily have referenced this section in the WSWPA. It did not.

In essence, the General Assembly declined to make hard policy choices and instead, left them for the Commission to decide. The policy statements and other guiding provisions of the WSWPA are simply not “as specific as the circumstances permit.” See *Adams*, 295 N.C. at 698, 249 S.E.2d at 411 (quoting *Turnpike*, 265 N.C. at 115, 143 S.E.2d at 323). For instance, the General Assembly declined to designate the desired balance between development and watershed protection or to specify the degree and type of protection sought by use of watershed classifications. Thereby it gave significant policy decisions to the Commission and so abdicated its responsibility to make these choices openly in the crucible of public debate and political compromise.

In *Adams*, our Supreme Court also recognized that the presence or absence of procedural safeguards to arbitrary agency action is relevant to a determination of whether a delegation is constitutional. *Adams*, 295 N.C. at 698, 249 S.E.2d at 411. There are significant procedural safeguards in the WSWPA itself. In addition, the N.C. Administrative Procedure Act (“NCAPA”), Chapter 150B of the General Statutes, governs the adoption and publication of rules under the WSWPA. See N.C. Gen. Stat. § 143-214.1(e) (1993). We must read the provisions of the NCAPA as complementing the procedural safeguards present in the WSWPA as the Court did *Adams* in regard to the CAMA. See *Adams*, 295 N.C. at 702, 249 S.E.2d at 413. Taken together, we conclude that these procedural safeguards are adequate. However, as discussed above, the WSWPA lacks meaningful guiding standards. Absent such standards, we further conclude that the applicable procedural safeguards alone are not enough to convert the WSWPA into a lawful delegation of legislative power.

In sum, we conclude that the WSWPA is an unconstitutional delegation of legislative power in violation of Article I, section 6 and Article II, section 1 of the North Carolina Constitution.

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

The County also asserts that the WSWPA violates the law of the land clause in Article I, Section 19, of the North Carolina Constitution and that the Hyde Amendment to the WSWPA, 1993 N.C. Session Laws ch. 520, violates its right to equal protection of the law. Since we have found the WSWPA unconstitutional in its entirety on other grounds, we need not address these additional constitutional arguments.

The order granting summary judgment to the State agencies on the County's cross-claim is reversed and the case is remanded to the trial court for entry of summary judgment for the County on its cross-claim against the State agencies for a declaratory judgment that the WSWPA is unconstitutional.

Judge SMITH concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's holding that the WSWPA is an unconstitutional delegation of legislative power because it "lacks meaningful guiding standards." A statute enacted by the General Assembly is presumed to be constitutional, *Wayne County Citizens Ass'n v. Wayne County Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991), and the burden is on the person challenging the statute to show it is unconstitutional. *Mobile Home Sales v. Tomlinson*, 276 N.C. 661, 669, 174 S.E.2d 542, 548 (1970).

As stated in *Adams v. Department of N.E.R. and Everett v. Department of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978), in proper instances a "modern legislature" must be able to delegate "a limited portion of its legislative powers [sic]' to administrative bodies which are equipped to adapt legislation 'to complex conditions involving numerous details with which the Legislature cannot deal directly.'" *Id.* at 697, 249 S.E.2d at 410 (quoting *Turnpike Auth. v. Pine Island*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965); *Coastal Highway v. Turnpike Auth.*, 237 N.C. 52, 60, 74 S.E.2d 310, 316 (1953)). Such delegation must be accompanied by "adequate guiding standards" that "need be only 'as specific as the circumstances permit.'" *Id.* at 698, 249 S.E.2d at 411 (quoting *Pine Island*, 265 N.C. at 115, 143 S.E.2d at 323). Furthermore,

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

[w]hen there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Id.

In a complex society “replete with ever changing and more technical problems, [the General Assembly] simply cannot do its job absent an ability to delegate power under broad general directives.” I Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.6, at 66 (3d ed. 1994); see 1 Jacob A. Stein, et al., *Administrative Law* § 3.03[4], at 3-96 (1993) (“the delegation doctrine has not invalidated legislation predicated on the vaguest of standards, even when the legislation’s standards are virtually non-existent”). Our Supreme Court has stated that “[d]etailed standards are not required” and the “modern tendency is to be more liberal in permitting grants of discretion to administrative agencies . . . to ease the administration of laws as the complexity of economic and governmental conditions increases.” *Commissioner of Ins. v. Rate Bureau*, 300 N.C. 381, 402, 269 S.E.2d 547, 563, *reh’g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980).

The WSWPA’s “Policy Statement” states that the statute “provides for a cooperative program of water supply watershed management and protection.” N.C.G.S. § 143-214.5(a) (1993). Furthermore, the statute mandates that the Environmental Management Commission (Commission) “shall adopt rules for the classification of water supply watersheds” designed to “protect surface water supplies by (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, or (iii) a combination of both (i) and (ii).” N.C.G.S. § 143-214.5(a), (b). The question is whether these guidelines are adequate.

The Commission, authorized to implement the WSWPA, was created to “promulgate rules” to protect, preserve, and enhance North Carolina’s water and air resources. N.C.G.S. § 143B-282(a) (1993). Before enacting the WSWPA, North Carolina used a different

TOWN OF SPRUCE PINE v. AVERY COUNTY

[123 N.C. App. 704 (1996)]

water classification system which was also designed to protect water supplies and which the Commission controlled and implemented. See Brandon Bordeaux, Comment, *Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill*, 29 Wake Forest L. Rev. 1279, 1283-84 (1994). Based on its prior work classifying water supplies, the Commission has the experience and knowledge to design and implement a water supply watershed classification system without detailed findings and requirements from the General Assembly. Furthermore, the WSWPA must be read in the context of Article 21, titled "Water and Air Resources," to which it is an amendment and which concerns itself with the protection, preservation and enhancement of our water and air resources. Article 21 sets out a declaration of public policy, including the achievement and maintenance of a "total environment of superior quality." N.C.G.S. § 143-211 (1993). In fulfilling its duties, the Commission has the responsibility of preserving and developing the State's natural resources "in the best interest of all its citizens." *Id.* This standard applies to the Commission's duty of protecting North Carolina's air and water resources, part of which includes the job of classifying water supply watersheds.

Although the WSWPA does not have detailed guiding standards, such detail is not necessary. The General Assembly has articulated guiding standards that are as "specific as the circumstances permit" and I would hold the WSWPA to be a constitutional delegation of legislative powers. I would therefore affirm the order of the trial court granting summary judgment to the State agencies on the County's cross-claim.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, JACOB M. KAPLAN, AND DAVID S. KAPLAN, PLAINTIFF-APPELLANTS v. PROLIFE ACTION LEAGUE OF GREENSBORO, WILLIAM H. WINFIELD, JR., LINDA WINFIELD, RONALD W. BENFIELD, SCOTT ALLRED, STEPHEN MICHAEL BEALL, SETH HINSHAW, ALBERT HODGES, JEFFREY ALEXANDER KENDALL, FATHER CONRAD KIMBROUGH, JULIAN McCLAMROCH, BERNARD McHALE, DUANE RICHARDSON, CANDIDO ROSARIO, A/K/A CANDIDO ROSARIO MATOS, DR. KEITH SCHIMMEL, RONALD STEINKAMP, JOHN THOMPSON, KEVIN WOLPERT, LEIGH ALLRED, KAREN L. BEANE, VIRGINIA BELL, SHARON STEELE CLARK, MARIANA DONADIO, LIBBY DUNSMORE, RHONDA EDMONDS, A/K/A RHODA EDMONDS, THERESA FARLEY, PAMELA FORD ALLISON, YVONNE FORD, HARIETTE GABRIELE, GEORGIA GAINES, ELSIE GALAN, KARIN GRUBBE, DEBORAH HEBESTREIT, DIANNE McCLAMROCH, ELAINE McHALE, REBECCA MORRISON, MONICA POLLARD, CAROL REDMOND, MARTA RICHARDSON, ELIZABETH D. SALTER, A/K/A BETTY SALTER, KIMBERLY SCHIMMEL, ANNABELLE SIMPSON, BETTY STEINKAMP, LYNN THOMPSON, LAUREL TREDDINICK, AMBER WINFIELD, CATHERINE WOLPERT, JOHN DOES XX THROUGH XXVIII, AND JANE DOES XXXV THROUGH XLII, DEFENDANT-APPELLEES.

No. COA95-1065

(Filed 17 September 1996)

1. Racketeer Influenced and Corrupt Organizations § 7 (NCI4th)—abortion pickets—private RICO action—pecuniary gain—summary judgment

Plaintiffs failed to proffer sufficient evidence under N.C.G.S. § 75D-2(c) to withstand defendants' motion for partial summary judgment where plaintiffs were a doctor and his family who brought an action under NC RICO against defendants arising from anti-abortion pickets of plaintiffs' personal residence and Dr. Kaplan's place of business. The plain language of the statute, coupled with legislative intent, clearly indicates that the scope of NC RICO is limited to cases where pecuniary gain is derived from organized unlawful activity prohibited under the statute. Assuming that plaintiffs have offered sufficient evidence of a pattern of racketeering activity prohibited by the statute, the record is devoid of any indication that the Prolife Action League of Greensboro (PALG) derived monetary gain from or as a result of the prohibited activities. Plaintiffs failed to establish as a matter of law a causal nexus between PALG's pecuniary gain and defendants' alleged organized unlawful activity under N.C.G.S. § 75D-4.

**Am Jur 2d, Extortion, Blackmail, and Threats
§§ 241-259.**

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

2. Racketeer Influenced and Corrupt Organizations § 7 (NCI4th)— anti-abortion pickets—private RICO action—damage to property—summary judgment

Plaintiffs failed to proffer sufficient evidence under N.C.G.S. § 75D-8(c) to withstand defendants' motion for partial summary judgment in an action under NC RICO arising from defendants' anti-abortion pickets of plaintiffs' personal residence and Dr. Kaplan's business because plaintiffs failed to demonstrate any injury or damage to property cognizable under NC RICO. The damages referred to in plaintiff's claim relate to loss of use and enjoyment of their home. Under *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, loss of use and enjoyment of property does not constitute an injury to property under federal RICO; even under the dissent in *Oscar*, plaintiffs' claim fails because the harm suffered by plaintiffs would not be imposed on anyone else who occupied the property as it does not arise from plaintiffs' connections to the land. It is apparent the General Assembly did not intend to provide NC RICO with a broader remedial stroke than its federal counterpart.

**Am Jur 2d, Extortion, Blackmail, and Threats
§§ 241-259.**

Judge JOHNSON dissenting in part and concurring in part.

Appeal by plaintiffs from order entered 15 May 1995 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 21 May 1996.

Smith, Helms, Mulliss & Moore, L.L.P., by Alan W. Duncan and Matthew W. Sawchak, for plaintiff-appellants.

Womble Carlyle, Sandridge & Rice, L.L.P., by Clayton M. Custer, for defendant-appellees Pamela Ford Allison, Marianne Donadio, Rhoda Edmonds, Theresa Farley, Yvonne Ford, Harriette Gabriele, Georgia Gaines, Karin Grubbe, Albert Hodges, Diane and Julian McClamrock, Bernard and Elaine McHale, Carol Redmond, Duane and Martha Richardson, Betty Salter, Keith and Kimberly Schimmel, Annabell Simpson, and Laurel C. Treddnick.

Tuggle, Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for defendant-appellee Virginia D. Bell.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

American Family Association Law Center, by Nathan W. Kellum, for defendant-appellees Scott and Leigh Ann Allred, Stephen Beall, Karen L. Beane, Elise Galan, Deborah Hebestreit, Jeffrey Alexander Kendall, Father Conrad Kimbrough, Rebecca Morrison, Candido Rosario, Betty and Ronald Steinkamp, John and Lynn Thompson, and Amber Winfield.

Frazier, Frazier & Mahler, by Harold C. Mahler, for defendant-appellees Libby Dunsmore, Bernard and Elaine McHale, and Annabell Simpson.

The American Center for Law and Justice, by Walter Weber, for defendant-appellees Linda Winfield, William H. Winfield, Jr. and Linda Winfield d/b/a the Prolife Action League of Greensboro.

MARTIN, Mark D., Judge.

Plaintiffs appeal from the trial court's grant of partial summary judgment to defendants on plaintiffs' claim for alleged violations of the North Carolina Racketeer Influenced and Corrupt Organizations Act (NC RICO).

The plaintiffs, Dr. Kaplan, a medical doctor, and his family, reside in Greensboro, North Carolina. Defendant Prolife Action League of Greensboro (PALG) is the organizational banner under which the named individual defendants espouse their anti-abortion beliefs. It is undisputed PALG has organized several pickets outside plaintiffs' personal residence and Dr. Kaplan's place of business because of the animus defendants hold towards abortion.

On 14 January 1992 plaintiffs instituted the present action against defendants claiming public and private nuisance; intentional infliction of emotional distress; invasion of privacy; violations of NC RICO, N.C. Gen. Stat. § 75D-1, *et seq.*; violations of the Federal Racketeer Influenced and Corrupt Organizations Act (federal RICO), 18 U.S.C. § 1961, *et seq.*; and interference with civil rights. In January 1992 plaintiffs voluntarily dismissed their federal RICO claim.

By order filed 8 June 1994, the Chief Justice of the Supreme Court of North Carolina designated the present case, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, as exceptional and assigned Superior Court Judge Thomas W. Ross to preside over all proceedings in this action.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

By order signed 15 May 1995, Judge Ross granted defendants' motions for partial summary judgment on plaintiffs' NC RICO claim.

On appeal plaintiffs contend they proffered sufficient evidence of "pecuniary gain," N.C. Gen. Stat. § 75D-2(c) (1990), and injury or damage to property, N.C. Gen. Stat. § 75D-8(c) (1990), and, therefore, the trial court erred by granting partial summary judgment to defendants.

At the outset we note a partial grant of summary judgment is an interlocutory order which is generally not subject to immediate appeal. *See, e.g., Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (*quoting Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)). In the present case, however, pursuant to the trial court's certification under N.C.R. Civ. P. 54(b), the parties are permitted to seek immediate review of the trial court's order. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253.

When ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). The moving party must "positively and clearly" show there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. *Id.* at 180, 454 S.E.2d at 828. The moving party is entitled to judgment as a matter of law if it can prove " 'that an essential element of the plaintiff's case is nonexistent' " *Id.* at 181, 454 S.E.2d at 828 (*quoting Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247, *disc. review denied on addtl issues*, 314 N.C. 548, 335 S.E.2d 27 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)).

In the present case, the propriety of the trial court's grant of partial summary judgment is controlled by this Court's interpretation of sections 75D-2(c) and 75D-8(c) of NC RICO. Construction of these provisions must necessarily be resolved by recourse to well settled canons of statutory interpretation.

The primary goal of statutory construction is to give effect to the intent of the legislature. *Bowers v. City of High Point*, 339 N.C. 413, 419, 451 S.E.2d 284, 289 (1994). "The will of the legislature 'must be found from the [plain] language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.' " *State v. Oliver*, 343 N.C. 202, 211, 470 S.E.2d 16, 22 (1996) (*quoting State ex rel. N.C. Milk Comm'n v.*

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

National Food Stores, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). In any event, where a statute is susceptible to two constructions, one constitutional and the other unconstitutional, the former will be adopted. *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977).

NC RICO was ratified approximately one year after the United States Supreme Court recognized the civil provisions of federal RICO were “evolving into something quite different from the original conception of its enactors.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500, 87 L. Ed. 2d 346, 361 (1985). Further, prior to its ratification by the General Assembly, the scope of NC RICO’s private right of action was substantially limited pursuant to hearings conducted by the Senate Judiciary IV Committee. See MINUTES FOR SENATE JUDICIARY IV COMMITTEE, 1st session (July 11, 1985) (hereinafter Senate Judiciary IV Minutes).

I.

[1] Section 75D-2(c) expressly limits the activities targeted by NC RICO. Specifically, section 75D-2(c) provides:

It is not the intent of the General Assembly that this Chapter apply to isolated and unrelated incidents of unlawful conduct but only to an interrelated pattern of organized unlawful activity, the purpose or effect of which is to derive pecuniary gain. Further, it is not the intent of the General Assembly that legitimate business organizations doing business in this State, having no connection to, or any relationship or involvement with organized unlawful elements, groups or activities be subject to suit under the provisions of this Chapter.

N.C. Gen. Stat. § 75D-2(c) (1990) (emphasis added). The plain language of the statute, coupled with the legislative intent, clearly indicates the scope of NC RICO is limited to cases where pecuniary gain is derived from organized unlawful activity prohibited under the statute. Put simply, section 75D-2(c) requires the aggrieved party to establish a causal connection between the alleged pecuniary gain and defendant’s activities which allegedly violate section 75D-4.

In the present case, plaintiffs assert defendants engaged in the following racketeering or unlawful organized activity: extortion; conspiracy to extort; attempted extortion; communication of threats; and transmittal of threatening writings. Plaintiffs further contend that, taken together, defendants alleged acts represent a pattern of racketeering activity prohibited under section 75D-4.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

We assume, without deciding, that plaintiffs have offered sufficient evidence of a pattern of racketeering activity prohibited under section 75D-4. Nevertheless, to withstand summary judgment, plaintiffs' forecast of evidence must also demonstrate a causal nexus between PALG's alleged pecuniary gain and defendants' organized unlawful activity under section 75D-4.

To establish pecuniary gain, plaintiffs direct this Court to three checks from defendant Virginia Bell (Bell checks) and PALG newsletters which solicit contributions. It is beyond question the Bell checks clearly evidence the receipt of money by PALG. In fact, defendants admit PALG is "getting money to operate the organization." The present record is nonetheless devoid of any indication PALG derived this monetary gain from, or as a result of, activities prohibited by section 75D-4. On the other hand, the newsletters, unlike the Bell checks, do not, in and of themselves, establish pecuniary gain. Further, even assuming the solicitations resulted in donations, plaintiffs failed to allege, much less proffer, evidence that the donations were in any way derived as a result of organized unlawful activity prohibited by section 75D-4.

Indeed, the newsletters do not recount any illegal activity by PALG. Rather, the only PALG sponsored events referenced in the newsletters are pickets, yard sales, covered dish suppers, meetings, and the like. Admittedly, PALG's picketing and demonstrating were intended to dissuade Dr. Kaplan from performing abortions, a lawful activity. We note, however, that all pickets, organized demonstrations, or boycotts, regardless of their substantive objective, are inherently coercive. Such activity ordinarily falls under the protective umbrella of the First Amendment to the United States Constitution. *Texas v. Johnson*, 491 U.S. 397, 404, 105 L. Ed. 2d 342, 353 (1989) (picketing "possesses sufficient communicative elements to bring the First Amendment into play").

Wholly apart from any constitutional considerations, however, plaintiffs have nonetheless failed to establish, as a matter of law, a *causal nexus between PALG's pecuniary gain and defendants' alleged organized unlawful activity under section 75D-4*.¹

1. The dissent implies we limit pecuniary gain to money extracted directly from plaintiffs. To the contrary, we superimpose no such requirement on section 75D-2(c). Rather, we merely apply the clear statutory mandate that the alleged pecuniary gain, no matter what the source of the funds, must be derived from the alleged unlawful activity.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

II.

[2] Alternatively, assuming plaintiffs proffered sufficient evidence of the requisite “pecuniary gain,” Judge Ross’ grant of partial summary judgment must also be affirmed on the entirely independent ground that plaintiffs failed to demonstrate any injury or damage to property cognizable under NC RICO.

Section 75D-8(c) provides, in pertinent part, “Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees.” N.C. Gen. Stat. § 75D-8(c) (1990) (emphasis added).

In the instant action, plaintiffs limit their NC RICO claim solely to alleged injury or damage to property. Specifically, plaintiffs “do not seek damages for the diminution in value of their house. Instead, the property damages referred to [in their NC RICO claim] relate to [plaintiffs’] loss of the *use and enjoyment of their home*, as a result of the defendants’ appearance targeted at [plaintiffs’] home.” The dispositive issue in this appeal therefore is whether “property,” as used in NC RICO, includes loss of use and enjoyment of plaintiffs’ personal residence.

We recognize that, generally speaking, the term property may include “not only the thing possessed but also . . . the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use.”² *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941). *See also Long v. City of Charlotte*, 306 N.C. 187, 201, 293 S.E.2d 101, 110-111 (1982) (“where a person’s right to [] use [or] enjoy . . . his land is substantially impaired, his property has been taken”). Nevertheless, our research has not revealed any jurisdiction which adopts such an expansive definition of “property” under its respective RICO statute.

2. N.C. Gen. Stat. § 75D-3(h) defines “real property” as “any real property situated in [North Carolina] or any interest in such real property, including . . . any lease of or mortgage upon such real property.” *Id.* Plaintiffs argue section 75D-3(h) implies that “property,” under section 75D-8(c), should be broadly construed. Even granting this assumption, the issue nevertheless remains whether the term “property” should be stretched to encompass the intangible property interest a claimant has in the use and enjoyment of its land.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

In fact, the only federal circuit court to squarely address the present issue has determined the loss of the use and enjoyment of one's personal residence does not constitute an injury to property recoverable under federal civil RICO. *Oscar v. University Students Co-Op. Ass'n*, 965 F.2d 783, 787-788 (9th Cir.), *cert. denied*, 506 U.S. 1020, 121 L. Ed. 2d 581 (1992). In *Oscar*, plaintiffs rented apartments near Barrington Hall, a student co-operative run by defendants. *Id.* at 784. Plaintiffs alleged that Barrington Hall was being used as a drug house and the attendant filth, noise, violence, and vandalism deprived them of the use and enjoyment of their rental property. *Id.* at 785. The district court dismissed plaintiffs' RICO claim. *Id.*

In affirming the dismissal, the Ninth Circuit stated:

While [federal] RICO is to be "liberally construed," it is well established that not all injuries are compensable under this section. Two limitations are significant in this case. First, a showing of "injury" requires proof of concrete financial loss, and not mere "injury to a valuable intangible property interest."

....

Second, it is clear that personal injuries are not compensable under [federal] RICO.

Id. (citations omitted). Characterizing plaintiffs' claim for loss of the use and enjoyment of their leasehold as a claim for "personal discomfort and annoyance," the Court concluded such a claim was "not a tangible injury to property . . . [because] the *market* value of [plaintiffs'] leasehold interest[s] has not declined." *Id.* at 787.

While our research indicates no other federal circuit court of appeals has addressed whether loss of use and enjoyment is an injury to property under federal RICO, several circuits have considered analogous situations and likewise declined to expand the definition of "property" under federal RICO. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918-919 (3d Cir. 1991) (medical expenses and emotional distress from exposure to toxic waste not recoverable, but diminution in market value of land recoverable); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (loss of security and peace of mind due to cancellation of insurance policy not actionable); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1179-1180 (7th Cir. 1989) (no cognizable RICO claim where harassment and intimidation directed against certain litigants in an effort to have them settle lawsuit). Indeed, the parties have not cited, and we are unaware of, any

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

federal circuit which has extended federal RICO to embrace injury to an intangible property interest that in no way diminishes the market value of the property.

Plaintiffs nevertheless argue this Court should adopt the rationale propounded in the *Oscar* dissent. According to the *Oscar* dissent, “[w]e are seven centuries too late to characterize [a] nuisance [which causes loss of use and enjoyment of property] as injury to person rather than to property.” *Oscar*, 965 F.2d at 793 (Kleinfeld, J., dissenting). We note, however, that unlike the present case, the *Oscar* plaintiffs alleged a nuisance which was inextricably related to their property and, in fact, the *Oscar* plaintiffs were “harmed only because of their connection to the land.” *Id.* at 793.

Indeed, the *Oscar* dissent, itself, emphasized the alleged nuisance in that case would unavoidably be imposed on any future occupant of the property. *Id.* at 794. As the dissent stated:

[plaintiffs] do not suggest that the narcotics dealers bore them any special animus, just that the drug dealing adversely affected the nearby apartments in which they had the misfortune to live. The harm would be imposed on anyone who had the connection to the real estate that [plaintiffs] did, and it would not have been imposed on [plaintiffs] but for their connection to the land.

Id. (emphasis added). Therefore, according to the reasoning of the *Oscar* dissent, a nuisance which is inextricably related to property represents an injury to property, albeit the intangible property interest in the use and enjoyment of one’s personal residence, under federal RICO. *See id.* at 793-794. *See also Long*, 306 N.C. at 201, 293 S.E.2d at 110 (“where a person’s right to [] use [or] enjoy . . . his land is substantially impaired, his property has been taken”); *Hildebrand*, 219 N.C. at 408, 14 S.E.2d at 256 (“property” includes the right to use and enjoy it).

It follows that plaintiffs’ NC RICO claim is fatally flawed under the reasoning of either the majority or dissent in *Oscar*. First, under the *Oscar* holding, loss of use and enjoyment of property does not constitute an injury to property under federal RICO. Second, even adopting the rationale of the *Oscar* dissent, plaintiffs’ claim in the present case fails because the alleged harm suffered by plaintiffs would not be imposed on anyone else who occupied the property as it does not arise from plaintiffs’ connection to the land. *Cf. Oscar*, 965 F.2d at 793-794. Rather, plaintiffs’ claim arises solely from alleged

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

PALG activities which specifically targeted plaintiffs, especially Dr. Kaplan, as individuals.

Because plaintiffs' claim would fail under the analogous federal RICO provision,³ and it is apparent the General Assembly did not intend to provide NC RICO with a broader remedial stroke than its federal counterpart, *see* Senate Judiciary IV Minutes, *supra*, we affirm the trial court's grant of partial summary judgment in favor of defendants.

In sum, plaintiffs failed to proffer sufficient evidence under either section 75D-2(c) or section 75D-8(c) to withstand defendants' motion for partial summary judgment. Accordingly, without prejudice to plaintiffs' right to seek redress under any one of their remaining claims, we affirm Judge Ross' grant of partial summary judgment.

Affirmed.

Judge LEWIS concurs.

Judge JOHNSON dissents in part and concurs in part.

Judge JOHNSON dissenting in part, and concurring in part.

The majority would impermissibly limit the reach of the North Carolina RICO Act in derogation of the statute's mandate and the General Assembly's intent. I respectfully dissent as to that part of the majority opinion which finds that summary judgment was properly granted for defendants Linda Winfield and the Prolife Action League of Greensboro, but concur as to the majority's decision that summary judgment was properly granted for all of the other listed defendants.

I find that not only do the activities allegedly engaged in by defendants fall within the prohibited behaviors espoused in the North Carolina RICO Act, but also that there is a sufficient causal nexus between the pecuniary gain of certain defendants and those activities in which they have engaged. Black's Law Dictionary defines "pecuniary" as "Monetary; relating to money; financial; consisting of money or that which can be valued as money." BLACK'S LAW DICTIONARY 1131

3. Federal RICO, 18 U.S.C. § 1964(c) provides recovery to any person "injured in his business or property . . ." whereas section 75D-8(c) provides recovery to "[a]ny innocent person who is injured or damaged in his business or property" We perceive no legally significant distinction between the language of these provisions.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

(6th ed. 1990). Further, the term “pecuniary benefits” is defined by Black’s as “Benefits that can be valued in money.” “Pecuniary benefits available to parents by reason of death of an adult child encompass those benefits, including money, that can be reasonably estimated in money, such as labor, services, kindness and attention of child to parents.” *Id.* (citations omitted).

The facts herein militate that this Court find that while defendants’ actions may not be taken for pecuniary purpose, they certainly have a pecuniary effect. Plaintiffs presented evidence which tended to show that defendants passed out leaflets to defendant League members, as well as non-members while picketing outside of plaintiffs’ residence, in an effort to elicit support and increase membership of defendant League. Such distribution has led to income in furtherance of the League’s effort to force Dr. Kaplan to stop performing abortions. In addition, defendants’ picketing Dr. Kaplan’s business and home increases the League’s visibility, and leads to increased donations, i.e., pecuniary gain, for its cause. Plaintiffs also point to the League’s newsletters soliciting (and consequently, receiving) money to fund its campaign against plaintiffs and other physicians’ families, yard sales, collections for anti-abortion billboards, etc., which also lead to pecuniary gain.

In fact, defendants admit that defendant League is “getting money to operate the organization,” but argue that pecuniary gain requires something more, such as evidence that the League’s income exceeded its expenses. In addition, defendants argue that the League’s income, to qualify as a pecuniary gain, has to be extracted directly from the Kaplans. I find this position to be untenable.

The statute only requires that the activity have the purpose or effect of pecuniary gain, and does not designate that the gain be had from plaintiffs or by defendants directly. Notably, plaintiffs have sought to discover various membership listings and financial records in order to further demonstrate the pecuniary effect of defendants’ actions in the instant case. This issue is also the subject of an opinion recently filed by this Court. *Kaplan, et al. v. Prolife Action League of Greensboro, et al.*, COA 95-1095 (N.C. Ct. App. Sept. 3, 1996). I find, without these listings and records which plaintiffs seek to discover, that there is still an adequate nexus between the actions of defendant Linda Winfield, who publishes and dispenses defendant League’s newsletter, and the League itself, and their consequent pecuniary gain to fulfill the requirements of the North Carolina RICO Act. As to the

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

other listed defendants, who appear to be mere contributors and/or members of defendant League, I agree with the majority that the evidence is insufficient to show that these persons *individually* derived any “pecuniary gain” from the actions detailed above.

Finally, I am also of the opinion that plaintiffs tendered sufficient evidence of injury or damage to property within the meaning of section 75D-8(c) of the North Carolina RICO Act to withstand defendants Linda Winfield and the League’s motion for summary judgment. Section 75D-8(c) of our RICO Act provides for recovery of treble damages by any person “injured or damaged in his business or property” by any violation of section 75D-4 of the Act. N.C.G.S. § 75D-8(c). In the instant action, plaintiffs seek compensation solely for the “loss of use and enjoyment of their home,” and not “for the diminution in the value” of their home.

While there is not any case law specifically addressing the necessary injury to “business or property” under section 75D-8(c), there is a formidable body of North Carolina case law, which discusses the “bundle of rights” that goes along with the ownership of real property. In *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 14 S.E.2d 252 (1941), our Supreme Court stated:

The word “property” extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; *the right to possess, use, enjoy and dispose of it*, and the corresponding right to exclude others from its use.

Id. at 408, 14 S.E.2d at 256 (emphasis added). Accordingly, “where a person’s right to possess, use, enjoy or dispose of his land is substantially impaired, his property has been taken.” *Long v. City of Charlotte*, 306 N.C. 187, 201, 293 S.E.2d 101, 110-11 (1982). In addition, plaintiffs cite section 75D-3(h) of the North Carolina RICO Act to support their argument that the legislature intended that the term “property” be construed broadly. *See* N.C. Gen. Stat. § 75D-3(h) (stating that “[r]eal property” includes “*any* interest in such real property,” including leases and mortgages) (emphasis added).

The majority references *Oscar v. University Students Co-Op. Ass’n*, 965 F.2d 783 (9th Cir.), *cert. denied*, 506 U.S. 1020, 121 L. Ed. 2d 581 (1992), and string cites several other circuit courts’

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

[123 N.C. App. 720 (1996)]

decisions interpreting the reach of federal civil RICO, in support of a narrower interpretation of the term “property” under the North Carolina RICO Act. It is true as the majority notes that at the time that this statute was ratified, of particular concern to the General Assembly was organized crime and its social ills. Since that time, however, other patterns of organized criminal activity—i.e., securities, mail and wire fraud, and anti-abortion activities—have escalated. We, as members of the judiciary who are often called upon to interpret our statutes to comport with our legislators’ intent, must be ever conscious and mindful of the care and deliberation taken by the General Assembly in fashioning the laws of North Carolina. In the case of the North Carolina RICO Act, the General Assembly, in drafting this particular statute, drew the statute in a broad manner to encompass plaintiffs’ action herein.

I find nothing in the legislative history of our RICO Act to support the majority’s strict construction of our civil RICO statute; and, therefore, refuse to place the “narrow and novel” strictures of the circuit courts upon the North Carolina RICO Act. This Court should instead find that the plain meaning of the Act and the body of North Carolina case law, which recognizes the right to possess, use, enjoy, and dispose of property as being a property interest, supports a broad reading of the term “property” and injury thereto.

As such, we should decline to follow the circuit courts’ decisions noted in the body of the majority opinion, interpreting the federal civil RICO Act. Accordingly, we should find that plaintiffs presented sufficient evidence that they had suffered an injury to “business or property” within the meaning of section 75D-8(c) of the North Carolina civil RICO Act to withstand defendants’ motion for summary judgment in regards to their North Carolina RICO claim.

Plaintiffs’ forecast of evidence does in fact show defendants Linda Winfield and the League’s actions had the effect of deriving “pecuniary gain” pursuant to section 75D-2(c) of the Act; and adequate injury to “business or property” under section 75D-8(c) of that same Act. As such, I dissent in part, and concur in part with the majority’s decision.

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

KEVIN LEE JUSTICE, PLAINTIFF v. CONSTANCE LEE JUSTICE, DEFENDANT

No. COA95-686

(Filed 17 September 1996)

Bankruptcy and Insolvency § 12 (NCI4th)— equitable distribution—prior discharge in bankruptcy—no objection by plaintiff-creditor

The trial court erred by failing to dismiss an equitable distribution claim where defendant had filed a petition for Chapter 7 bankruptcy on 27 September 1990; the petition included all of the marital debts and listed plaintiff as a general unsecured creditor regarding "disputed claims for marital debts" in the amount of \$4,000; plaintiff received timely notice of the bankruptcy proceeding and was represented by counsel; plaintiff requested relief from the stay to protect his interest in the marital residence but made no objection to the discharge of marital debt and requested no further relief; the Bankruptcy Court granted defendant's petition; plaintiff filed a motion for absolute divorce and equitable distribution on 9 April 1991; defendant moved to dismiss the equitable distribution claim on the grounds that it was barred by the earlier bankruptcy proceeding; and the trial court denied the motion to dismiss. A right to equitable distribution is a claim as defined under the Bankruptcy Code and is subject to being discharged. Plaintiff received adequate notice that his marital interests were at issue but did not object to the discharge of marital debts nor request relief from the stay to pursue an action for equitable distribution.

Am Jur 2d, Bankruptcy § 1111.

Alimony, maintenance, and support debts as exceptions to bankruptcy discharge, under § 523(a)(5) of Bankruptcy Code of 1978 (11 USCS § 523(a)(5)). 69 ALR Fed. 403.

Judge JOHN dissenting.

Appeal by defendant from order entered 4 January 1995 by Judge J. Kent Washburn in Alamance County District Court. Heard in the Court of Appeals 29 February 1996.

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

Wishart, Norris, Henninger & Pittman, P.A., by J. Wade Harrison and June K. Allison, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell and Cary E. Close, for defendant-appellant.

WALKER, Judge.

The plaintiff and defendant were married on 10 April 1987 and separated on 29 October 1989. The defendant filed a petition for Chapter 7 bankruptcy protection on 27 September 1990, which included all of the marital debts accumulated by the parties. The petition listed the plaintiff as a general unsecured creditor regarding "disputed claims for marital debts" in the amount of \$4,000.00. The plaintiff received timely notice of the bankruptcy proceeding and was represented by counsel. Plaintiff requested relief from the stay to protect his interest in the marital residence but made no objection to the discharge of marital debt and requested no further relief from the Bankruptcy Court. On 6 March 1991, the Bankruptcy Court granted defendant's Chapter 7 petition.

On 9 April 1991, plaintiff filed a motion for absolute divorce and equitable distribution. The court entered a judgment on 5 June 1991 granting an absolute divorce and reserving all equitable distribution matters. During the two-day equitable distribution hearing on 18 and 19 October 1993, the defendant moved to dismiss the equitable distribution hearing on the grounds that the claim was barred by the earlier bankruptcy proceeding. The trial court denied defendant's motion to dismiss and entered a final equitable distribution order on 4 January 1995. The order contained the following pertinent findings and conclusions:

FINDINGS OF FACT

...

5. On September 27, 1990, some 11 months after the date of separation, the defendant filed a Chapter 7 Petition for bankruptcy protection in the United States District Court for the Middle District of North Carolina. The plaintiff had notice of defendant's Bankruptcy Petition and in fact asked for a lifting of the stay as to the parties' former marital residence.

6. On March 6, 1991, the defendant's Bankruptcy Petition was granted, and the defendant was discharged as to those debts as

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

listed in her Petition. Those debts include most, if not all, of the marital debts that had been accumulated by the parties.

...

12. The income of the defendant exceeds that of the plaintiff. Having considered the contentions by each party for an uneven distribution, the Court finds that the plaintiff is entitled to an uneven distribution of the marital property.

...

17. The marital estate has negative value. . . .

CONCLUSIONS OF LAW

...

3. The defendant's Bankruptcy Petition had the effect of discharging \$4,000 of plaintiff's disputed claim for equitable distribution.

4. This Court has authority pursuant to §50-20 et seq. of the North Carolina General Statutes to enter an Order providing for an uneven distribution of marital property. An equal division would not be equitable. Based upon the disparity in the respective incomes of the parties, the Court finds that there should be an uneven distribution in favor of the plaintiff such that the defendant pays to the plaintiff a distributive award of \$4,500.

...

7. It is equitable because the income of the defendant is greater than that of the plaintiff that the defendant pay a distributive award to the plaintiff of \$4,500 and be allocated those debts allocated to the defendant above after giving due consideration to the \$4,000 amount of plaintiff's claim against defendant which was discharged in bankruptcy.

8. It is equitable because the income of the defendant is greater than that of the plaintiff that the plaintiff receive a distributive award of \$4,500 from defendant, and that the plaintiff be allocated marital debt as enumerated above taking into account the effect of the [defendant's] Bankruptcy Petition which discharged [defendant] from her obligation to pay \$4,000 of plaintiff's claim.

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

On appeal, defendant contends that the trial court erred (1) by finding that plaintiff's equitable distribution claim was not discharged by defendant's prior bankruptcy, (2) by awarding plaintiff a greater than equal share of the parties' marital estate and ordering defendant to pay a distributive award based upon a finding that defendant's income exceeded that of the plaintiff, and (3) by placing the burden of loss of certain household furnishings on defendant.

I.

Turning to defendant's first assignment of error—whether the trial court erred by allowing plaintiff to commence an equitable distribution claim following defendant's prior bankruptcy—is a question of first impression before this Court. Defendant contends that plaintiff should not be permitted to proceed with a claim for equitable distribution where plaintiff received notice of defendant's bankruptcy and participated with counsel in the bankruptcy proceeding without raising any objection to the discharge.

The effect of a discharge under Chapter 7 is to relieve the debtor from all debts or claims that arose before the date of the order for relief. 11 U.S.C. § 727(b) (1986); 11 U.S.C. § 101(12) (1986). A discharge in bankruptcy:

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . , whether or not discharge of such debt is waived.

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor. . . .

11 U.S.C. § 524(a)(1)(2) (1984). These provisions are designed to protect the debtor from a subsequent suit in state court regarding a debt or claim that was discharged. "Debts" and "claims" are to be broadly construed so as to permit the broadest possible relief and afford the debtor a "fresh start." H.R. 95-595, 95th Cong., 1st Sess. 180, 309 (1977).

A. Pre-petition Claim

As support for her position that plaintiff's equitable distribution claim was a pre-petition claim, defendant relies on the case *Perlow v.*

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

Perlow, 128 B.R. 412 (E.D.N.C. 1991). In *Perlow*, Mr. Perlow filed an action on 9 May 1988 requesting absolute divorce and equitable distribution of marital property. *Id.* at 413. The court granted the divorce on 14 June 1988 but reserved the issue of equitable distribution until a later date. *Id.* The valuing of marital property and the equitable distribution of such property had not occurred at the time Mr. Perlow filed a Chapter 7 petition in bankruptcy. *Id.* at 415. In his petition for relief, Ms. Perlow was listed as a general unsecured creditor on a claim described as "Case 88 CVD 813; Contingent, Disputed, Unliquidated; Division of Marital Property." *Id.* at 413-14. Ms. Perlow received timely notice of the bankruptcy but failed to object to the discharge or otherwise seek relief from the bankruptcy court. *Id.* at 416.

On 21 September 1989, Ms. Perlow filed a motion in Wayne County District Court requesting that the court distribute the parties' marital property and require Mr. Perlow to pay debts previously discharged by the Bankruptcy Court. *Id.* at 414. The *Perlow* court recognized that upon filing a petition for Chapter 7 liquidation, an estate is comprised of all legal and equitable interests of the debtor and any interest in property acquired within six months after the filing (including property obtained pursuant to a settlement agreement or divorce decree). *Id.* at 415; 11 U.S.C. § 541 (1984). Among the assets not included in the bankruptcy estate are tenancy by the entirety property, exempt property, or post-petition income. Property in which the debtor has an ownership interest is included in the bankrupt's estate, whether or not it would be classified as "marital property." In *Perlow*, the court stated that Ms. Perlow's right to equitable distribution was a general unsecured claim which was properly listed as a debt in Mr. Perlow's bankruptcy petition. *Id.* at 415. Therefore, the court concluded that where Ms. Perlow failed to object to Mr. Perlow's discharge or request an exception from the stay upon receiving proper notice of the proceeding, her pending claim for equitable distribution was discharged. *Id.* at 416. While we might have decided *Perlow* differently, it is instructive and must be taken into account, particularly in view of the fact that it is a decision of a federal court interpreting federal bankruptcy law.

In the case *sub judice*, plaintiff attempts to distinguish *Perlow*, on the basis that no claim for equitable distribution was pending at the time of defendant's bankruptcy. "Claim" is defined under the Bankruptcy Code as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5)(A) (1986). Therefore, the question of whether a particular action qualifies as a pre-petition claim does not depend on whether the action was actually filed.

Under the law in this State, the right to equitable distribution is a “species of common ownership . . . vesting at the time of the parties separation.” N.C. Gen. Stat. § 50-20(k) (1995). This Court has held that “[s]ubsection k did not create any vested rights in *particular marital property*; [rather] it created a right to the equitable distribution of that property, whatever a court should determine that property is.” *Wilson v. Wilson*, 73 N.C. App. 96, 99, 325 S.E.2d 668, 670, *disc. review denied*, 314 N.C. 121, 332 S.E.2d 490 (1985) (emphasis in original). Further, N.C. Gen. Stat. § 50-21(a) (1995) provides “[a]t any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed. . . .” Therefore, following the parties’ separation, a spouse’s right to equitable distribution does not create any vested rights in particular marital property but rather creates in each spouse an unliquidated, unsecured, contingent claim as defined by federal law which may be discharged in bankruptcy.

Further, other courts have already recognized that a right to equitable distribution is a “claim” as defined under the Code and is subject to being discharged by the debtor. *See e.g., Perlow v. Perlow*, 128 B.R. 412, 415 (1991); *see also Mosley v. Mosley*, 450 S.E.2d 161, 164 (Va. App. 1994); *In re Polliard*, 152 B.R. 51, 54 (Bankr. W.D.Pa. 1993); *In re Fischer*, 67 B.R. 666, 669 (Bankr. D. Colo. 1986); *Pellitteri v. Pellitteri*, 628 A.2d 784, 788 (N.J. Super. 1993).

B. Notice

Pursuant to 11 U.S.C. § 727(a), a Chapter 7 debtor must comply with the notice requirement and other requirements of the Bankruptcy Code to receive a discharge of all pre-petition debts or claims. *First Union Nat. Bank v. Naylor*, 102 N.C. App. 719, 722, 404 S.E.2d 161, 162 (1991). Section 521(1) provides that the debtor must file a list of creditors with the court. 11 U.S.C. § 521(1) (1986). The Code provides in pertinent part that:

[a] discharge under section 727. . . does not discharge an individual debtor from any debt . . . neither listed nor scheduled under section 521(1). . . with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit . . . timely

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing. . . .

11 U.S.C. § 523(a)(3)(A) (1993).

In *Cato v. Cato*, 118 N.C. App. 569, 570, 455 S.E.2d 918, 918 (1995), the plaintiff filed an action requesting that the court order the defendant to perform his debt obligations under the parties' separation agreement. Prior to plaintiff's action, defendant filed for bankruptcy under Chapter 7. *Cato*, 118 N.C. App. at 569, 455 S.E.2d at 918. The trial court found that the defendant failed to list plaintiff as a creditor in his bankruptcy schedules or provide plaintiff with notice of the bankruptcy proceeding. *Id.* at 570, 455 S.E.2d at 919. On appeal, defendant argued that the debts were discharged since plaintiff had actual knowledge of the bankruptcy sufficient to meet the requirements of the Code. *Id.* This Court remanded the case for a determination of whether the non-debtor spouse acquired actual knowledge of the debtor's bankruptcy in order to timely file a proof of claim. *Cato*, 118 N.C. App. at 572, 455 S.E.2d at 920; 11 U.S.C. § 523(a)(3).

Notwithstanding the fact that plaintiff was listed as a general unsecured creditor and participated in the bankruptcy proceeding, plaintiff contends that defendant's designation of "\$4,000 of disputed marital debt" did not adequately provide him with notice of the type and extent of the claim sought to be discharged. The Bankruptcy Code requires the debtor to file a list of creditors and schedule of assets and liabilities in order to receive a discharge of pre-petition debts. *Cato*, 118 N.C. App. at 571, 455 S.E.2d at 919. However, following such notice, the burden is on the creditor to file a proof of claim if there is a dispute regarding the amount of the scheduled debt or if the creditor contends that there are additional debts that have not been scheduled by the petitioning debtor. 11 U.S.C. § 501 (1984); 11 U.S.C. § 523(a)(3)(A).

However, notice may be found to be insufficient where the debtor fails to schedule the non-debtor spouse as a creditor or where the notice fails to specify that the debtor is attempting to discharge marital interests. In *First Union Nat. Bank v. Naylor*, 102 N.C. App. 719, 723, 404 S.E.2d 161, 163 (1991), this Court held that the wife's breach of contract claim against the husband for failure to pay a marital debt pursuant to a separation agreement survived the husband's bankruptcy discharge where the husband did not list the wife as a creditor and there was no evidence to suggest that the wife had notice or actual knowledge of his bankruptcy petition.

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

Here, the plaintiff was listed as a general unsecured creditor in the bankruptcy petition. In addition, he was given notice that defendant was seeking to discharge "disputed claims for marital debts" in the amount of \$4,000. There is no dispute that plaintiff received notice of the bankruptcy. Indeed, plaintiff and his counsel participated in the proceeding by requesting relief from the automatic stay to protect his interest in the marital residence. Under the facts of this case, we find that plaintiff received adequate notice that his marital interests were at issue but he did not object to the discharge of marital debts nor request relief from the stay to pursue an action for equitable distribution. Therefore, the trial court erred by failing to dismiss plaintiff's claim for equitable distribution.

C. Protections Afforded

Plaintiff argues that he should not be required to request relief from the automatic stay and file for equitable distribution in order to prevent the debtor-spouse from discharging his claim for equitable distribution. We disagree.

While there is no question that courts have struggled to balance the competing policies of equitable distribution and bankruptcy, the Bankruptcy Code provides protection for the non-debtor spouse. First, plaintiff could have requested relief from the automatic stay to commence his claim for equitable distribution in state court. 11 U.S.C. § 362(d) (1984). Bankruptcy courts may grant relief from the stay to allow equitable distribution proceedings in state court. Federal courts traditionally give great deference to the expertise of state courts in matters involving domestic law. *See e.g., In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992); *Caswell v. Lang*, 757 F.2d 608, 610 (4th Cir. 1985); *Matter of Gardner*, 26 B.R. 65, 69 (W.D.N.C. 1982); *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985); *In re Bible*, 110 B.R. 1002, 1010 (Bankr. S.D.Ga. 1990); *In re Revco D.S., Inc.*, 99 B.R. 768, 776-77 (Bankr. N.D. Ohio 1989). Indeed, the plaintiff was aware of this option insofar as he was granted a limited relief from the stay in order to protect his interest in the marital residence.

Second, the plaintiff could have objected to the discharge of marital debts on the grounds that they were non-dischargeable. 11 U.S.C. § 523. For example, obligations of the debtor that are in the nature of child support, alimony, or maintenance are excepted from discharge under 11 U.S.C. § 523(a)(5). The Code was recently amended to provide additional protection to the non-debtor spouse. Although not in effect at the time of this case, Section 523(a)(15) (1994) now excepts

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

from discharge marital debts which are in the nature of a property settlement unless:

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Following an objection by the non-debtor spouse pursuant to 11 U.S.C. § 523(a)(15), an adversary proceeding is held in Bankruptcy Court to determine if the statutory conditions are satisfied.

In addition to these remedies, a non-debtor spouse as a creditor has a claim against the bankrupt's estate. *Perlow*, 128 B.R. at 415. Absent taking steps to perfect an interest in the debtor spouse's property, a non-debtor spouse is a general unsecured creditor and has the same rights as any other unsecured creditor to be compensated from the estate. *Id.* Unfortunately, in this case, there were insufficient assets to compensate any of the unsecured creditors. Therefore, when a non-debtor spouse has a claim for equitable distribution concerning "property whose status as marital is foreseeably a matter of some dispute, a former spouse cannot sit on [his or] her rights in bankruptcy, only to surface later and lay claim to that property after it had already been subjected to possible liquidation, attachment, or other manner of disposal." *Walston v. Walston*, 190 B.R. 66, 68 (1995).

II.

In her second assignment of error, defendant argues that the court erred in awarding plaintiff a greater than equal share of the parties' marital estate and ordering defendant to pay plaintiff a distributive award upon consideration of defendant's discharge in bankruptcy. We need not reach this issue, having decided that the trial court erred when it failed to dismiss plaintiff's equitable distribution claim in this case.

In conclusion, we hold that plaintiff's pre-petition claim for equitable distribution was discharged on 6 March 1991 along with defend-

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

ant's pre-petition debts. 11 U.S.C. § 524(a). Therefore, we hold that the trial court erred in denying defendant's motion to dismiss plaintiff's equitable distribution claim. Accordingly, we vacate the equitable distribution order and remand this cause to the trial court for entry of an order allowing defendant's motion to dismiss.

Vacated and remanded.

Judge EAGLES concurs.

Judge JOHN dissents.

Judge JOHN dissenting.

I respectfully dissent and vote to affirm the trial court in all respects.

Perlow, relied upon by the majority, has been criticized, *see* Daniel R. Cowans, *Bankruptcy Law and Practice* § 7.4, at 109 (6th ed. 1994) ("question of common ownership of what was not answered"), and *see generally* Elisabeth S. Petersen, Krista F. Norstog Leonard, Robert A. Ponton, Jr., L. Diane Tindall, & Christopher C. Fox, *Bankruptcy and Equitable Distribution* § VII, 65-96 (manuscript presented at Intensive Seminar: Advanced Problems in Equitable Distribution, 2-4 December 1993, N.C. Bar CLE), and is in any event distinguishable.

Assuming *arguendo* that an equitable distribution claim is dischargeable in bankruptcy, *see* Cowans and Petersen *et al.*, *supra*, I find the case of *Hoffman v. Hoffman*, 157 B.R. 580 (E.D.N.C. 1992), more persuasive. In *Hoffman*, wife was served with a copy of husband's Notice of Chapter 11 bankruptcy filing, the meeting of creditors under 11 U.S.C. § 341, as well as the bankruptcy court's order setting a bar date for proofs of claim. *Id.* at 582. Husband listed the parties' pending divorce action as a "chose in action" upon his declaration of assets schedule, although no value was assigned, and, while not listing wife as a creditor, "place[d] her name and address on the original mailing matrix." *Id.* Husband appealed the bankruptcy court's determination that wife's equitable distribution claim, filed subsequent to the bankruptcy court's confirmation of husband's Chapter 11 plan, had not been discharged.

The District Court affirmed the ruling of the bankruptcy court, noting that

JUSTICE v. JUSTICE

[123 N.C. App. 733 (1996)]

[husband] failed to list [wife] as a creditor or to otherwise alert her to the fact that her equitable distribution rights were pending in the bankruptcy.

Id. at 583. Later, the Court reiterated,

[a]lthough [wife] had actual notice of the bankruptcy proceeding, she had no notice that her marital claims against the [husband] were at issue.

Id. at 584. The Court observed that wife's presence "was necessary as a co-owner in the properties being sold to pay the claims," *id.*, and that

[husband] could have elected to invoke the jurisdiction of the Bankruptcy court to determine the marital property rights of [wife], but he elected not to do so.

Id.

In addition, the Court approved the bankruptcy court's determination that *Perlow* was distinguishable

in that the debtor in *Perlow* specifically listed Ms. Perlow as an unsecured creditor with priority, noting that the claim was "contingent, disputed, unliquidated, Division of Marital Property." In addition, the *Perlow* debtor filed a notice with the Bankruptcy Court with service upon Ms. Perlow stating "all matters of equitable distribution will be requested to be completed by the Bankruptcy Court" and that "it is the contention of the plaintiff that upon the determination of equitable distribution by the Bankruptcy Court that all matters concerning distribution of property in this action should be dismissed."

Id. at 583.

Similarly, in the case *sub judice*, while plaintiff "had actual notice of the bankruptcy proceeding," *id.* at 584, he was listed on defendant's petition as a general unsecured creditor only regarding "disputed claims for marital debts" in the amount of \$4,000. This listing, referring solely to "marital debts," in no way gave plaintiff "notice that [his] marital claims against the [defendant] were at issue." *Id.* at 584. Plaintiff, like the wife in *Hoffman*, "was not aware that [his] marital rights were being extinguished." *Id.* Accordingly, the trial court properly proceeded to hear his equitable distribution claim.

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

PATRICIA H. FLETCHER, PLAINTIFF V. RICHARD N. FLETCHER, DEFENDANT

No. COA95-626

(Filed 17 September 1996)

1. Divorce and Separation § 36 (NCI4th)— separation agreement—rescission of agreement—reconciliation and subsequent separation—evidence not sufficient

The trial court erred by ordering rescission of the parties' separation agreement where plaintiff left the marital home and moved into a mobile home which she maintained as a separate residence; the parties entered into a separation agreement; plaintiff returned to the marital home, taking with her one work outfit and toiletry items such as make-up and a toothbrush; the parties spent approximately four hours each evening together from 6 December until 11 December, eating dinner and spending time with their sons; plaintiff returned to her trailer on one occasion for more work clothes; plaintiff and defendant engaged in sexual intercourse three to four times; defendant asked plaintiff to leave on the last day, stating that he wanted to be with his girlfriend; and plaintiff resumed full-time residence in her mobile home on that date. The separation agreement was executed subsequent to the enactment of N.C.G.S. § 52-10.2 and the "totality of the circumstances" test applies; evidence that the parties engaged in sexual intercourse three or four times is in no way determinative. The events of 5 December to 11 December 1993 do not constitute "substantial objective indicia" sufficient to justify the trial court's conclusion as a matter of law that plaintiff and defendant reconciled; additionally, the evidence was insufficient to support the ruling that the executed provisions of the agreement are null and void based on the parties' words and conduct substantially defeating the purpose of the separation agreement.

Am Jur 2d, Divorce and Separation §§ 852-855.**2. Divorce and Separation § 42 (NCI4th)— separation agreement—recision—breach of agreement—evidence insufficient**

The trial court erred by ordering rescission of a separation agreement on the basis of defendant's "material breaches" where defendant's breaches were not material, *i.e.*, they neither substantially defeated the purpose of the agreement nor went to the

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

very heart of the agreement. The right to rescind does not exist where the breach is not substantial and material and does not go to the heart of an agreement, and the trial court's decree that breaches of the agreement were material is a conclusion of law and reviewable as any question of law.

Am Jur 2d, Divorce and Separation § 861.

Judge WALKER concurring

Appeal by defendant from order entered 9 March 1995 by Judge Stephen Franks in Transylvania County District Court. Heard in the Court of Appeals 27 February 1996.

Averette & Barton, by Donald H. Barton, for plaintiff-appellee.

C. Dawn Skerrett for defendant-appellant.

JOHN, Judge.

Defendant contends the trial court erred, *inter alia*, by ordering rescission of the parties' separation agreement. We agree.

Undisputed pertinent facts and procedural information are as follows: Plaintiff and defendant were married 10 August 1974. Plaintiff left the marital home 10 August 1993 and soon thereafter moved into a mobile home which she maintained as her separate residence. On 13 October 1993, the parties entered into a "Separation Agreement" (the agreement), wherein each expressed the intention to live separate and apart from the other on a permanent basis. The agreement settled child custody as well as property division issues, the parties respectively agreeing not to "seek a different distribution of any property in any action."

On the evening of 5 December 1993, plaintiff returned to the marital home, taking with her one "work outfit" and toiletry items such as make-up and a toothbrush. For the following five days, from 6 December 1993 until 11 December 1993, the parties spent approximately four hours together each evening eating dinner and spending time with their sons. Plaintiff returned to her trailer on one occasion for more work clothes. During the six day period, plaintiff and defendant engaged in sexual intercourse three to four times. On 11 December 1993, defendant asked plaintiff to leave, stating he wished to be with his girlfriend. Plaintiff resumed full-time residence in her mobile home on that date.

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

Plaintiff filed the instant action on or about 31 August 1994, alleging defendant had breached the agreement and that the events in December constituted a reconciliation. She requested that the court rescind the agreement and effect an equitable distribution of the marital property. Defendant filed answer denying plaintiff's allegations and seeking specific performance of the agreement and counsel fees.

Following a hearing, the trial court denied defendant's motion for directed verdict and granted plaintiff's prayer for relief, determining in pertinent part as follows:

10. That the Defendant, Richard Fletcher, breached said agreement in the following respects.

a. [I]n that on or about August 3, 1994, the son, Brian Matthew Fletcher, had [dental] surgery and Plaintiff was not contacted by [defendant] in regards to his having surgery

b. [I]n that he failed to cancel the joint credit card accounts with VISA, J.C. Penney's and Sprint

c. [B]y failing to pay [plaintiff] the full amount of . . . her interest in the pension benefits of [defendant]. . . .

. . . .

12. That the parties did reconcile as a matter of law in that they resumed living together in the home which they occupied before the separation and thus held themselves out as [husband] and wife and resumed marital cohabitation in that home and thus rescinded the separation agreement entered into by and between the parties.

The judge thereafter ordered the following:

2. That said separation agreement and the executory provisions thereof, including the waiver by the Plaintiff . . . of her right to an equitable distribution are declared null and void.

3. That . . . based on the reconciliation of the parties, their words and conduct substantially defeating the purpose of the separation agreement, the executed provisions of the agreement are declared null and void.

4. That further, the Court decrees that the breaches of the separation agreement by the Defendant . . . were material breaches.

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

That the parties, in fact, reconciled . . . and that the period of separation on which to base an absolute divorce on one year's separation . . . shall commence upon the re-separation of the parties on or about December 11 or 12, 1993.

5. That . . . the Court . . . shall proceed to determine what is the marital property of the parties and provide for an equitable distribution of the marital property

Defendant appeals, arguing the trial court erred by rescinding the agreement based upon the court's determination that: (1) the parties reconciled subsequent to execution of the agreement; and (2) defendant materially breached the agreement. We conclude rescission was error under the circumstances *sub judice*.

I.

[1] N.C. Gen. Stat. § 52-10.2 (1991), enacted 1 October 1987, sets out the test by which conduct between separated spouses is measured in order to determine if reconciliation has been effected:

"Resumption of marital relations" shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations.

Resumption of marital relations voids the executory portions of a separation agreement, *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976), and

if [such] conduct of the [parties] substantially defeat[s] the purpose of the . . . agreement even the executed provisions of that agreement are void.

Stegall v. Stegall, 100 N.C. App. 398, 411-12, 397 S.E.2d 306, 314 (1990), *disc. review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).

The much criticized holding in *Murphy v. Murphy*, 295 N.C. 390, 245 S.E.2d 693 (1978), that casual or isolated instances of sexual intercourse between separated spouses constitute reconciliation, *see* Sally Burnett Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. Rev. 819, 841-42 (1981) (result of *Murphy* "is that parties (or at least one party) will be penalized for trying to reconcile if he or she is unsuccessful in that

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

attempt”), and Patricia L. Holland, Note, *Isolated Acts of Sexual Intercourse Void Separation Agreements—Murphy v. Murphy*, 16 Wake Forest L. Rev. 137, 148 (1980) (while isolated acts test serves “goal of judicial efficiency, it undermines the goal of judicial integrity”), was overruled by enactment of G.S. § 52-10.2. The “totality of the circumstances” standard of G.S. § 52-10.2 also determines when reconciliation has occurred so as to toll the one-year period of separation required for divorce. See N.C. Gen. Stat. § 50-6 (1995).

The method by which a trial court may evaluate whether separated spouses have reconciled is dictated by

two lines of cases regarding the resumption of marital relations: those which present the question of whether the parties hold themselves out as [husband] and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element. See *Hand v. Hand*, 46 N.C. App. 82, 264 S.E.2d 597, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980). . . . The first method, represented by *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976), requires the presence of substantial objective indicia of cohabitation as [husband] and wife. When such evidence exists, the trial court may find that the parties have reconciled as a matter of law. The second method, on the other hand, exemplified by the *Hand* decision, involves conflicting evidence; the subjective mutual intent of the parties, therefore, becomes an essential element.

Schultz v. Schultz, 107 N.C. App. 366, 369, 420 S.E.2d 186, 188 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).

In the case *sub judice*, the facts surrounding the determinative events of the six-day period in December 1993 are essentially undisputed, save a minor conflict regarding which of the parties first transported plaintiff to the former marital home. The trial court therefore correctly applied the approach of the first line of cases in considering whether the parties had reconciled “as a matter of law.” Consequently, our standard of review is whether, as a matter of law, “substantial objective indicia,” *Schultz*, 107 N.C. App. at 369, 420 S.E.2d at 118, exist from the “totality of the circumstances” to support the conclusion that the parties “voluntarily renew[ed] . . . the husband and wife relationship.” G.S. § 52-10.2.

In *Schultz*, this Court held the undisputed evidence presented to the trial court was sufficiently substantial to determine as a mat-

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

ter of law that the parties had resumed marital relations under G.S. § 52-10.2. *Schultz*, 107 N.C. App. at 373, 420 S.E.2d at 190. The record revealed that husband had moved back into the marital residence, bringing his belongings, his pets, and his automobile, and that he lived in the marital home continuously over a four month period during which he paid utility and other joint bills, and mowed the lawn. Further, wife did husband's laundry, and the couple went shopping together as well as worked in the yard and dined at restaurants. Moreover, the parties filed a joint tax return and "engaged in sexual relations about once a week for at least two or three months after [husband's] return." *Id.*

In concluding as a matter of law that the parties in *Schultz* had resumed the husband and wife relationship, this Court found analogous the undisputed facts in *Adamee*, which our Supreme Court deemed sufficient as a matter of law to establish that the parties had "held themselves out as husband and wife living together." *Adamee*, 291 N.C. at 392-93, 230 S.E.2d at 546. In *Adamee*, wife returned to the marital home approximately one month following execution by the parties of a separation agreement and consent judgment, and remained at the home with husband until his death some eight months later. *Id.* at 393, 230 S.E.2d at 546. Further evidence showed the couple had

occupied one bedroom and one bed; that [husband] paid to [wife's] attorney the balance she owed him for representing her in the suit against [husband]; that the respective attorneys for [husband] and [wife], who had been appointed commissioners in the consent judgment to sell the parties' jointly owned property at public auction and divide the proceeds equally between them were instructed that the parties no longer desired a sale, and no sale was made; that [husband] told friends he and his wife had worked out their problems and were planning an early retirement in order to open an antique shop in Alabama; that the month before his death [husband] had instructed a friend in Alabama to proceed with attempts to purchase a certain piece of property for himself and wife jointly; that they had had problems but they had been settled.

Id. at 390, 230 S.E.2d at 544-45.

Although the foregoing provides guidance for review of the evidence in the case *sub judice*, to the extent *Adamee* contradicts

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

present law regarding reconciliation as expressed in G.S. § 52-10.2, the latter controls. For example, the statute sets out a “totality of circumstances” standard. Our courts have not yet determined the explicit meaning of “totality of the circumstances” for purposes of G.S. §§ 52-10.2 and 50-6. However, the “totality of the circumstances” test in the context of constitutional challenges to searches and seizures has been defined as a standard which “focuses on all the circumstances of a particular case, rather than any one factor.” Black’s Law Dictionary 1490 (6th ed. 1990). This definition is likewise applicable for purposes of G.S. §§ 52-10.2 and 50-6. Consequently, we hold that isolated factors no longer control in determining when parties have “renew[ed] . . . the husband and wife relationship” per G.S. § 52-10.2. *See, e.g., Murphy*, 295 N.C. at 397, 245 S.E.2d at 698 (sexual intercourse), and *Adamee*, 291 N.C. at 392-93, 230 S.E.2d at 546 (resumption of living together in marital home). To resolve the issue, courts must evaluate “all the circumstances of a particular case,” Black’s Law Dictionary, *supra*.

The agreement herein was executed subsequent to the enactment of G.S. § 52-10.2, and therefore the “totality of the circumstances” test set out in the statute applies to the events of 5 December-11 December 1993. Employing the statutory standard, we hold those events do not constitute “substantial objective indicia,” *Schultz*, 107 N.C. App. at 369, 420 S.E.2d at 188, sufficient to justify the trial court’s conclusion “as a matter of law” that plaintiff and defendant reconciled. In addition, the evidence is insufficient to support the court’s ruling that

based on the reconciliation of the parties, their words and conduct substantially defeating the purpose of the separation agreement, the executed provisions of the agreement are declared null and void.

Significantly, factors cited in *Adamee* and *Schultz* as indicative of reconciliation are noticeably absent in the case *sub judice*. For example, plaintiff never “moved” back into or resumed cohabitation in the marital home, but instead maintained her separate residence at which she kept her possessions and from which she removed only clothing for work. In addition, the time period involved herein was less than a week, compared with the four and eight month time frames involved in *Schultz* and *Adamee* respectively. Further, no evidence in the record reveals the parties resumed the sharing of chores or household responsibilities, that they accompanied each other to

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

public places so as to “[hold] themselves out as husband and wife,” *Adamee*, 291 N.C. at 392, 230 N.C. at 546, or that they indicated to family and/or friends that their problems had been resolved or that they desired to terminate the separation. To the contrary, plaintiff and defendant continued to abide by the terms of the agreement, distributing property in accordance therewith and relying upon the provisions regarding their children. Moreover, defendant’s statement that he wished plaintiff to leave because “he wanted to be with his girlfriend” comprises a compelling indication that no reconciliation with plaintiff occurred.

Finally, evidence that the parties engaged in sexual intercourse three or four times during this six day period is in no way determinative. Pursuant to G.S. § 52-10.2, “[i]solated incidents of sexual intercourse . . . shall not constitute resumption of marital relations.”

To hold otherwise—that four hours on each of six evenings spent together in the former marital home eating dinner and visiting with the parties’ children in combination with three or four “isolated acts” of sexual intercourse constitute reconciliation as a matter of law—would effectively “resurrect *Murphy* from a well-deserved demise,” *Higgins v. Higgins*, 321 N.C. 426, 493, 364 S.E.2d 426, 433, *reh’g denied*, 322 N.C. 116, 367 S.E.2d 911 (1988) (Whichard, J., dissenting), and directly contradict the “totality of the circumstances” test mandated by G.S. § 52-10.2.

II.

[2] We similarly reject plaintiff’s reliance upon the trial court’s determination that defendant “material[ly] breach[ed]” the agreement. Indeed, plaintiff in her appellate brief implicitly admits the weakness of this position by asserting that

it is important to note that the Trial Court did not rescind the Separation Agreement by and between the parties, solely or even substantially, because of the [defendant’s] breaches of the Separation Agreement

“Rescission, an equitable remedy, is allowed to promote justice. The right to rescind does not exist where the breach is not substantial and material and does not go to the heart of an agreement.” *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 243 (1964). “[R]escission of a separation agreement requires proof of a material breach—a substantial failure to perform.” *Cator v. Cator*, 70 N.C. App. 719, 722, 321 S.E.2d 36, 38 (1984) (intermittent payment of

FLETCHER v. FLETCHER

[123 N.C. App. 744 (1996)]

alimony for six month period a “mere lapse of performance” and not a “substantial failure to perform”).

In its order, the trial court found as a fact that defendant “breached” the agreement by: 1) failing to contact plaintiff in reference to dental surgery performed on the parties’ younger son, 2) failing to cancel joint credit card accounts with VISA, J.C. Penny’s, and Sprint, and 3) failing to pay plaintiff the full amount of her interest in defendant’s pension benefits.

While plaintiff properly cites *Camp v. Camp*, 75 N.C. App. 498, 503, 331 S.E.2d 163, 167, *disc. review denied*, 314 N.C. 663, 335 S.E.2d 493 (1985), for the proposition that “[w]here the court sits as judge and juror, its findings of fact . . . are conclusive on appeal if there is evidence to support them,” her assertion that the trial court’s determination of materiality is likewise “conclusive on appeal” misses the mark. Assuming *arguendo* that evidence in the record supports the court’s findings of defendant’s lack of compliance with certain provisions of the agreement, the court’s decree that such “breaches . . . were material breaches” is a conclusion of law; it is therefore not binding on the appellate court, but reviewable as any question of law. See *R. L. Coleman & Co. v. City of Asheville*, 98 N.C. App. 648, 651, 392 S.E.2d 107, 109, *disc. review denied*, 327 N.C. 432, 395 S.E.2d 689 (1990).

Upon thorough review, we hold defendant’s “breaches” of certain provisions of the agreement were not material, *i.e.*, they neither “substantially defeated the purpose” of the agreement, *Stegall*, 100 N.C. App. at 412, 397 S.E.2d at 314, nor went “to the very heart” of the agreement, *Wilson*, 261 N.C. at 43, 134 S.E.2d at 242, and could not as a matter of law be characterized as “a substantial failure to perform.” *Cator*, 70 N.C. App. at 722, 321 S.E.2d at 38. See also *Lee v. Lee*, 93 N.C. App. 584, 588, 378 S.E.2d 554, 556 (1989) (nondisclosure of \$102,000 loan owed to plaintiff’s company was material breach justifying rescission of separation agreement where “essence of the separation agreement was that the parties must fully disclose all of their assets worth \$100 or more”), and *Stegall*, 100 N.C. App. at 411, 397 S.E.2d at 314 (changing title of property in contravention of provision of separation agreement would “effectively nullify that provision”). The trial court therefore erred in ordering rescission of the agreement on the basis of defendant’s “material breaches” thereof.

For the reasons discussed herein, we reverse the trial court’s order directing rescission of the agreement and providing that

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

plaintiff might pursue equitable distribution of the parties' marital property.

Reversed.

Judge EAGLES concurs.

Judge WALKER concurs in separate opinion.

Judge WALKER concurring.

I agree that the parties did not reconcile subsequent to the execution of the separation agreement and that defendant had not materially breached the agreement so as to entitle the plaintiff to rescission. Therefore, the parties remain bound by the separation agreement. This Court has stated: "A separation agreement that has not been incorporated into a divorce judgment may be equitably enforced by an order of specific performance." *Harris v. Harris*, 50 N.C. App. 305, 312, 274 S.E.2d 489, 493, *disc. review denied and appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981); *Edwards v. Edwards*, 102 N.C. App. 706, 708, 403 S.E.2d 530, 531, *disc. review denied*, 329 N.C. 787, 408 S.E.2d 518 (1991). Accordingly, if defendant continues to fail to satisfy his obligations pursuant to the agreement, plaintiff may pursue the remedy of specific performance.

STATE OF NORTH CAROLINA v. KEVIN JAVAN HAIRSTON, DEFENDANT

STATE OF NORTH CAROLINA v. DARRELL NATHANIEL HAIRSTON, DEFENDANT

No. COA95-1304

(Filed 17 September 1996)

**1. Evidence and Witnesses § 1457 (NCI4th)— blood sample—
chain of custody—identity of person drawing blood**

The trial court did not err by admitting into evidence in a prosecution for armed robbery, burglary and rape defendant's blood sample where defendant contended that the State did not adequately establish the chain of custody due to insufficient evidence of who actually drew the blood. The testimony indicates

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

that either the doctor who testified or his nurse drew the blood and that no one else was having their blood drawn by the doctor when defendant was with him. Any doubt as to the collection procedure of the blood and any weakness in the chain of custody relates only to the weight to be given to the evidence and not to its admissibility.

Am Jur 2d, Evidence §§ 948, 949; Expert and Opinion Evidence § 300.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation. 95 ALR2d 681.

2. Evidence and Witnesses § 2209 (NCI4th)— forensic serology—qualification of witness as expert

The trial court did not err in a prosecution for armed robbery, burglary and rape by finding that a witness was an expert in forensic serology where the witness had a degree in biology from Appalachian State University, he was employed with the FBI in Washington, D.C. where he received training in the field of forensic serology, he is currently employed by the SBI and has worked in the forensic serology unit for sixteen years, he has testified as an expert in the field of forensic serology approximately two hundred times, and he has attended various seminars on the topic of forensic serology. The witness had particularized training and experience in forensic serology and was properly accepted by the trial court as an expert.

Am Jur 2d, Expert and Opinion Evidence §§ 53-67.

3. Evidence and Witnesses § 2211 (NCI4th)— DNA—qualification of witness as expert

The trial court did not err in a prosecution for armed robbery, burglary and rape by qualifying as an expert in forensic DNA analysis a witness who was currently the assistant director of the forensic identity unit at Roche Bio-medical Laboratories in the Research Triangle Park; at the time of the crime she was a special agent with the SBI and worked in the DNA analysis unit of the serology section; she had a degree in biology and a master's in genetics from North Carolina State; she had approximately a year and a half of in-house training consisting of learning to perform forensic DNA analysis, performing hundreds of blood sam-

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

ples and other kinds of samples, taking a series of proficiency tests and participating in a case internship program under the direction of another trained and qualified DNA analyst; she attended two DNA classes specifically focusing on forensic DNA analysis at the FBI Academy in Quantico, Virginia; and she has previously testified in court and given her opinion as an expert witness in forensic DNA analysis.

Am Jur 2d, Expert and Opinion Evidence §§ 53-67.**Admissibility of DNA identification evidence. 84 ALR4th 313.****4. Appeal and Error § 147 (NCI4th)— general objection at trial—grounds not apparent from context—assignment of error not addressed**

An assignment of error to the trial court's denial of defendant's request to voir dire a DNA expert as to testing procedures was not addressed on appeal where defendant made only a general objection at trial and the grounds of the objection were not apparent from the context.

Am Jur 2d, Appellate Review §§ 614, 615.**5. Criminal Law § 1097 (NCI4th)— Fair Sentencing Act—balancing mitigating and aggravating factors—discretion of trial court**

The trial court did not err in sentencing defendant where defendant contended that his sentence was disproportionate in relation to those most defendants receive for the same or similar offenses where the trial court found no factors in mitigation and found as an aggravating factor that defendant had a prior conviction or convictions punishable by more than sixty days' confinement. The balance struck by the trial court when weighing mitigating and aggravating factors will not be disturbed if there is support in the record for the trial court's determination.

Am Jur 2d, Criminal Law §§ 598, 599.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

Appeal by defendant Darrell Nathaniel Hairston from judgment entered 2 June 1995 by Judge Julius A. Rousseau, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 21 August 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lars F. Nance, for the State.

John W. Gambill for Darrell Nathaniel Hairston, defendant appellant.

SMITH, Judge.

On 13 November 1993, the victim was sleeping in her home, along with her three children aged 10, 11 and 17 in North Wilkesboro, North Carolina. In the early morning hours she was awakened by a noise in her living room. She looked down the hallway and could see figures going back and forth in the living room. She thought it was her oldest son, as he had the habit of getting out of bed and watching T.V. late at night. The victim called out to her son several times to tell him to go back to bed. When he did not answer, she said she was going to count to three, and then she was going to go into the living room to make him go back to bed. She began to count and when she got to two, defendant ran down the hallway and lunged at her. Defendant jumped on the victim's bed and knocked her off onto the floor. Defendant fell on top of the victim, and then pulled her up by her arm and held a razor to her neck. The victim described the razor as being a utility knife, approximately six inches in length. As the defendant held the knife against her neck he said, "Shhh. Shhh. Be quiet. Be quiet. I won't hurt you if you be quiet. If you scream, I will hurt you." He asked the victim if she understood, and she said, "Yes." He then took the knife away from her neck, and she started to scream. Defendant put the razor back against her neck and said, "I mean business. I will kill you if you scream again. Tell me where your money is. You're not going to scream again, are you?" She shook her head no, and he took the razor away. The victim screamed again and called out, "Please don't hurt me," and she tried to fight him. She reached up to grab his hair and his toboggan fell off his head. At this point, his face was right in front of hers. He asked her again where her money was. The victim told him where it was and begged him to just take it and go. The victim started looking at her telephone, and the defendant reached over and cut the phone wire. The defendant then pulled the victim up and around to the foot of her bed, where she fell to the floor. The victim

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

grabbed the foot of her bed and held onto it saying, "No, I'm not going." The defendant yelled, "Come on, come on," and he grabbed the victim's necklace and tried to pull it off her neck. He said, "I want that necklace." The victim protested and tried to get the necklace off to give it to the defendant, but he jerked her arm and threw her back down onto the floor.

A second man, later identified as Kevin Javan Hairston, came into the room and knelt on the bed and leaned down and said something to the defendant. The two men whispered to each other and then Kevin went back into the living room. The defendant began to pull the victim's clothing, and she started to run towards the bedroom door. Defendant was pulling at her underwear, and as she started to run out of the room Kevin came back into the bedroom. Defendant said to Kevin, "Help me here." Both men knocked the victim to the floor. The defendant started to choke the victim, and she almost blacked out. Kevin put his knee on the victim's chest to hold her down and held the razor against her neck, while defendant raped the victim. While defendant raped the victim, Kevin tried to make the victim perform a sexual act on him, but the victim would not. The victim remembers that the defendant ejaculated and then said to Kevin, "Come on, you can do this." The defendant held down the victim, while Kevin raped her. The victim testified that Kevin continued to rape her until he seemed to finish, but she was not positive that he ejaculated, as she was hysterical at that point.

Defendant and Kevin dragged the victim to her feet, and she asked if she could put on some underwear. They let her do so, and then demanded to know where her money was. The victim said, "I told you to start with where my money was, I said it's over there beside the bed there, or it's in the living room beside the T.V. stand." Kevin went into the living room to look for the money, leaving the victim with defendant in the bedroom. When defendant could not find the money in the bedroom, he ordered the victim to start walking out of the bedroom. He said, "Come on. Let's see you walk." The victim walked into the hallway and went into the living room. The victim noticed that defendant and Kevin were looking at each other and not at her, so she lunged for the front door. The victim ran outside and saw a police car driving up to her house. The victim's oldest son had escaped from the house and called the police from a neighbor's house during the attack.

Defendant was convicted of one count of attempted robbery with a dangerous weapon, one count of first degree burglary and one

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

count of first degree rape. He was sentenced to forty years for the armed robbery charge, fifty years for the first degree burglary charge, and life in prison for the first degree rape charge. Defendant appeals.

[1] Defendant first assigns error to the admission into evidence of State's Exhibit No. 36, defendant's blood sample, which he provided at the hospital for the Rape Suspect Evaluation Kit. Defendant argues that the State did not adequately establish the chain of custody of the exhibit because sufficient evidence of who actually drew the blood was not presented. We disagree.

The North Carolina Supreme Court has stated that the person who draws the blood sample need not always testify to establish a proper foundation for the admission of the sample. *State v. Grier*, 307 N.C. 628, 632, 300 S.E.2d 351, 354 (1983), *appeal after remand*, 314 N.C. 59, 331 S.E.2d 669 (1985). Further, lack of specificity as to the collection procedures of a blood sample will not lead to a rejection of the evidence unless there is a crucial reason for requiring such evidence of specificity. "The lack of such evidence was crucial in *Robinson [v. Life and Casualty Ins. Co.]*, 255 N.C. 669, 674, 122 S.E.2d 801, 804 (1961)] because it was necessary to determine whether the [blood] sample had been taken before or after the deceased had been injected with embalming fluid." *Grier*, 307 N.C. at 633, 300 S.E.2d at 354. "There was, then, good reason to require specificity as to who drew the blood and when the blood was drawn since the injection of embalming fluid would obviously taint any findings as to the presence of alcohol in the bloodstream." *Id.*

In the present case, the State's witness, John C. Potter, M.D., a physician at Wilkes Regional Medical Center testified that, on 15 November 1993, police brought defendant to the hospital for specimen collections for a Rape Suspect Evaluation Kit. Potter testified that he collected from defendant pubic hair, saliva samples, hair samples from the head and blood samples. At trial, Potter identified each specimen from the kit and each specimen, except for the blood sample, was admitted into evidence without objection. The following colloquy took place at trial:

Q. I'm marking the object I've removed from State's 28 as State's Exhibit Number 36 and handing it to you, Doctor. Can you identify that, please, sir?

A. Yeah, these are the blood samples that were drawn on Darrell Hairston.

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

Q. And, are . . . do you recognize your own signature. . . .

A. . . . oh, surely, this is my handwriting, and it says "Darrell Hairston" as well as the date and time and my signature.

Q. Okay.

MRS. HARDING: State would move to introduce State's

MR. GAMBILL:OBJECTION.

THE COURT: Sir?

MR. GAMBILL: OBJECTION. No foundation has been laid to who drew the blood.

THE COURT: Who did draw the blood?

A. As I say, typically, when I sign that, I know that I drew the blood. If I did not draw the blood personally . . . sometimes a nurse in attendance will actually physically draw the blood while I'm standing there and then place it in the box.

THE COURT: OVERRULED.

MRS. HARDING: Introduce State's 36 then, please, Your Honor.

THE COURT: All right.

On cross-examination the defense asked Doctor Potter if he had taken samples from two different people at the same time, and the Doctor responded, "They were separated by about an hour it seems from looking at the record." The testimony indicates that either Dr. Potter or his nurse drew the blood from the defendant and that no one else was having their blood drawn by Dr. Potter when defendant was with him. Thus, any doubt as to the collection procedure of the blood and any weakness in the chain of custody of the blood sample relates only to the weight to be given to the evidence and not to its admissibility. *State v. Detter*, 298 N.C. 604, 634, 260 S.E.2d 567, 588 (1979); *Grier*, 307 N.C. at 633, 300 S.E.2d at 354. We find no error.

[2] Defendant's second and third assignments of error relate to expert witnesses, and we will address them together. Defendant assigns error to the trial court's findings that D.J. Spittle was an expert in forensic serology and that Anita L. Matthews was an expert in forensic DNA analysis. We disagree.

An expert witness is a witness whose study or experience, or both, makes the witness better qualified than the jury to form an opin-

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

ion on a particular subject. *Federal Paper Board Co. v. Kamy, Inc.*, 101 N.C. App. 329, 334, 399 S.E.2d 411, 415, *disc. review denied*, 328 N.C. 570, 403 S.E.2d 510 (1991). A witness may be qualified as an expert if the trial court finds that through "knowledge, skill, experience, training, or education" the witness has acquired such skill that he or she is better qualified than the jury to form an opinion on the particular subject. N.C. Gen. Stat. § 8C-1, Rule 702 (Cum. Supp. 1995). "Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987) (citations omitted). "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.'" *State v. Evangelista*, 319 N.C. 152, 164, 353 S.E.2d 375, 384 (1987) (quoting *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978)).

At trial, the State called D.J. Spittle to testify as an expert witness in forensic serology. Before the State tendered him as an expert witness, Spittle testified to the following: (1) He has a degree in biology with a minor in chemistry and a master's degree in biology from Appalachian State University. (2) He was employed with the Federal Bureau of Investigation ("FBI"), in Washington, D.C. where he received training in the field of forensic serology. (3) He is currently employed by the North Carolina State Bureau of Investigation ("SBI"), and has worked in the forensic serology unit for sixteen years. (4) He has testified as an expert in the field of forensic serology approximately two hundred times, and he has attended various seminars on the topic of forensic serology. This testimony established that the witness had particularized training and experience in forensic serology, and he was properly accepted by the trial court as an expert in that area. We find no error.

[3] The State also called Anita L. Matthews to testify as an expert in forensic DNA analysis. Before the State tendered her as an expert witness, she testified to the following: (1) She is currently the assistant director of the forensic identity unit at Roche Bio-medical Laboratories in Research Triangle Park. (2) At the time of the crime she was a special agent with the SBI and worked in the DNA analysis unit of the serology section. (3) She has a degree in biology and a master's degree in genetics from North Carolina State. (4) When she started with the SBI she had approximately a year and a half of in-house training consisting of learning how to perform forensic DNA

STATE v. HAIRSTON

[123 N.C. App. 753 (1996)]

analysis, performing hundreds of blood samples and other kinds of samples, taking a series of proficiency tests and participating in a case internship program under the direction of another trained and qualified DNA analyst. (5) She attended two DNA classes specifically focusing on forensic DNA analysis at the FBI Academy in Quantico, Virginia, and has previously testified in court and given her opinion as an expert witness in forensic DNA analysis. Again, we find that, based on her training and experience in the area of forensic DNA analysis, Anita L. Matthews was properly accepted by the trial court as an expert in that field.

[4] Defendant next assigns error to the trial court's denial of defendant's request to voir dire State's witness Anita L. Matthews as to testing procedures. We decline to address this assignment of error as it was not properly preserved for review.

"[A] general objection, if overruled, is ordinarily not effective on appeal." *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986); N.C. Gen. Stat. § 8C-1, Rule 103(a) (1992). Further, N.C.R. App. P. 10(b)(1) (1996) provides:

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

This Court will not consider arguments based upon matters not presented to, or adjudicated by the trial tribunal. *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980) (citations omitted).

At trial, defendant made a general objection to Anita L. Matthews' testimony and requested voir dire. The grounds of the objection are not apparent from the context, and we decline to address the merits of this assignment of error.

[5] Defendant's last assignment of error is that the trial court erred in sentencing defendant in that his sentence was disproportionate in relation to those most defendants receive for the same or similar offenses in North Carolina. We disagree.

"The balance struck by a trial court when weighing mitigating and aggravating factors will not be disturbed if there is support in the record for the trial court's determination." *State v. Canty*, 321 N.C. 520, 527, 364 S.E.2d 410, 415 (1988).

STATE v. HUNT

[123 N.C. App. 762 (1996)]

Once a trial court has found, by the preponderance of the evidence, that aggravating factors outweigh mitigating factors, the trial court has the discretion not only to increase the sentence above the presumptive term, but also the discretion to determine to what extent the sentence will be increased.

Id. (citing *State v. Melton*, 307 N.C. 370, 380, 298 S.E.2d 673, 680 (1983)).

In the present case, the trial court found no factors in mitigation and found as an aggravating factor that the defendant has a prior conviction or convictions for criminal offenses punishable by more than sixty days' confinement. Defendant was sentenced to consecutive terms of fifty years for first degree burglary, forty years for attempted armed robbery and a mandatory life sentence for first degree rape. We find adequate support in the record for the trial court's determination of defendant's sentence. In defendant's trial we find

No error.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. ISAAC HENRY HUNT, JR.

No. COA95-1024

(Filed 17 September 1996)

**1. Arrest and Bail § 142 (NCI4th)— bond—new indictment—
ex parte bond setting**

The trial court did not err by denying defendant's motion to dismiss charges of burglary, first-degree sexual offense, and assault based on the prosecutor's *ex parte* contact with the superior court judge where defendant was arrested and charged with first-degree burglary, first-degree sexual offense and misdemeanor assault on a female, he was released the same day on a \$1,000 bond, the prosecutor submitted a bill of indictment for the charges but substituting assault with a deadly weapon inflicting serious injury for the misdemeanor assault charge, the grand jury issued indictments, the prosecutor approached the senior resi-

STATE v. HUNT

[123 N.C. App. 762 (1996)]

dent superior court judge to have bond set for the new felony charge, the bond was set at \$30,000, and defendant was rearrested. At the time of the second arrest, defendant was not in custody and had not been released to answer the charges of assault with a deadly weapon inflicting serious injury. The \$30,000 bond was a new bond for the new charge and there was no improper conduct when the prosecutor asked the judge to set bond for the new charge. Even so, there was no prejudice because, even though defendant argues that he was deprived of opportunities to gather evidence and search out witnesses, he had approximately three weeks after his initial release to gather evidence while it was still fresh in potential witnesses' minds.

Am Jur 2d, Bail and Recognizance §§ 6, 7, 23 et seq., 42 et seq.

2. Evidence and Witnesses § 3004 (NCI4th)— prior conviction—motion in limine to prohibit cross-examination—no testimony from defendant—not preserved for appeal

The issue of whether the trial court erred in a prosecution for burglary, first-degree sexual offense, and assault by denying defendant's motion in limine to prohibit the State from cross-examining him about a fourteen-year-old prior Florida conviction for involuntary sexual battery and burglary was not preserved for appellate review where defendant did not testify. He elicited testimony from one witness tending to show that he believed the incident was consensual and from another that it may have been mistaken identity. Without knowing which theory defendant would have pursued, the extent of prejudice or probative value could not be determined. Aspects of *Luce v. United States*, 469 U.S. 38, and its reasoning are adopted for application to cases under N.C.G.S. § 8C-1, Rule 609(b).

Am Jur 2d, Witnesses §§ 916, 919, 924, 926, 927.

Appeal by defendant from judgments and commitments entered 22 March 1995 by Judge Louis Meyer in Wake County Superior Court. Heard in the Court of Appeals 23 April 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General William P. Hart, for the State.

Douglas W. Corkhill for defendant-appellant.

STATE v. HUNT

[123 N.C. App. 762 (1996)]

LEWIS, Judge.

Defendant appeals his convictions for first degree burglary, first degree sexual offense and assault with a deadly weapon inflicting serious injury. We find no error.

On 22 September 1994, defendant was arrested and charged with first degree burglary, first degree sexual offense and misdemeanor assault on a female. Defendant was released on a \$1,000.00 bond the same day.

After talking with the victim, the prosecutor submitted a bill of indictment to the Grand Jury containing the above-mentioned felonies and a third felony, assault with a deadly weapon inflicting serious injury, in place of the misdemeanor assault charge. The Grand Jury issued indictments on all three felonies. Thereafter, the prosecutor approached the senior resident superior court judge to have bond set for the new felony charge. The judge set bond at \$30,000.00 and defendant was rearrested on 13 October 1994. Defendant was given the opportunity to have a bond hearing, but refused. He was released on bail and subsequently convicted of all three charges by a jury. Defendant was sentenced to life for the sexual offense, forty years for the burglary and three years for the assault.

At trial, the victim testified that sometime prior to the alleged incident, she had seen defendant in her next-door neighbor's driveway. Thereafter, the neighbor moved away and defendant came to victim's door on two occasions to inquire whether she knew where the neighbor had moved and asked her if she wanted to "smoke a joint." The victim testified that she began to think someone was stalking her around the same time.

On 21 September 1994, the victim was taking a shower when she heard someone at her window. After finding muddy footprints on her porch, she called the Wake County Sheriff's Department to file a prowler report. Later that evening, the victim heard neighborhood dogs barking and feared that the prowler was returning. She went outside to unhook a neighbor's dog and let her dog out. A neighbor called to say he had seen someone walking up and down her street and warned her to be careful. She then picked up a lead pipe and went to the door to let her dog back in. As she opened the door, she saw a man with a black ski mask and black shirt. He grabbed her and they began to struggle.

STATE v. HUNT

[123 N.C. App. 762 (1996)]

After the intruder overpowered the victim, he pinned her to the floor and began to make sexual advances toward her. She hit him over the head with the lead pipe, but he continued his advances, banging her head on the floor and inserting his fingers into her vagina. As a result of this confrontation, the victim's face, arms and feet were bleeding. She also had two black eyes and choke marks on her neck.

The victim testified that she feared for her life and began to talk with defendant and convince him that she wanted to have a "real relationship" with him. She persuaded him to take the ski mask off. She identified defendant as her attacker. After hiding the mask underneath the bag in a trash can, the victim agreed to go to a nearby bar with defendant. Instead, she escaped and drove to the Garner Police Station.

The victim denied that she had given her consent to any of the events which occurred that evening and stated that she had never gone on a date with defendant. She further testified that prior to the attack, defendant had walked up and down her street almost every evening at 10:00 p.m. and that one night she ran out and confronted him.

Patrick Hurley, a neighbor of the victim, testified that on 20 September 1994 around 9:30 p.m., he saw a white male walking up the street in dark clothes. He observed the same person the next evening at the same time and decided to call the victim to alert her because she was a single woman. Defendant is a white male.

Another neighbor of the victim, fourteen-year-old Jessica Parnell, testified that a few months before she was attacked, the victim expressed concern that someone was stalking her and was very frightened. Miss Parnell testified that she had seen a man walking up and down the street on several occasions and identified defendant at trial as that man.

Tim Hill, a former next-door neighbor and boyfriend of the victim, testified that she did not drink or frequent bars. He explained that their relationship ended because he was drinking and doing a lot of drugs and she did not approve. He also testified that he had worked with defendant and that defendant lived within walking distance of the victim's home.

Rose Beam, a deputy with the Wake County Sheriff's Department, testified that on 21 September 1994 she was called to the Garner

STATE v. HUNT

[123 N.C. App. 762 (1996)]

Police Station. Deputy Beam accompanied the victim to her house where they found blood on the floor and a torn shirt. However, they were not able to locate the mask in the trash can.

The defendant called Geraldine Morris who testified that she was a neighbor of the victim and had seen her on the sidewalk accusing a man of peeping in her windows. Ms. Morris stated that defendant was not the man the victim was speaking to on that occasion because defendant had a larger build and shorter hair.

Christopher Hawkins testified that he is an acquaintance of defendant. On 21 September 1994 around 9 p.m., he stated that he saw defendant at the Rock-Ola Cafe in Garner with a female. Mr. Hawkins identified the victim to be the female accompanying defendant that evening. He stated that she was wearing jeans and a black t-shirt.

Defendant did not testify.

On rebuttal, the State recalled the victim. She testified that she had never been to the Rock-Ola Cafe with defendant and had only been there one time a couple months prior to the trial with a man from her Bible study. She also testified that at the beginning of the trial, she saw defendant in the courtroom with a female who looked like her with the same height, build, complexion and hair color.

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss prior to trial since the prosecutor had an impermissible ex parte contact with the superior court judge at the time he obtained the \$30,000 bond. In his brief, defendant contends that the bond, set following the Grand Jury indictments, was a modification of an existing bond and therefore the second arrest order was improper under N.C. Gen. Stat. section 15A-305(b)(1). However, defendant has not assigned error to the arrest order and he has therefore abandoned the right to argue it on appeal. *See* N.C.R. App. P. 10(a) (1996).

Nonetheless, we have reviewed defendant's contentions and find them without merit. G.S. section 15A-305 provides:

An order for arrest may be issued when: A grand jury has returned a true bill of indictment against a defendant who is not in custody and who has not been released from custody pursuant to Article 26 of this Chapter, Bail, to answer to the charges in the bill of indictment.

G.S. § 15A-305(b)(1) (1988). At the time the second arrest order was issued, defendant was not in custody. Additionally, he had not been

STATE v. HUNT

[123 N.C. App. 762 (1996)]

released from custody to answer the charges in the bill that he had committed assault with a deadly weapon inflicting serious injury, the charge for which the new bond was set. We hold that the \$30,000 bond was not a modification, but a new bond for the new felony charge. Therefore, the arrest order was not improper.

Defendant additionally alleges that it was improper for the prosecutor to approach the superior court judge to set the new bond without notifying his attorney. He argues that such conduct is unethical, was not cured by the offer of a bond hearing and requires a dismissal of the charges against him. We disagree. As stated above, the \$30,000 bond was not a modification, but a bond set for the new felony indictment. There was no improper conduct on the part of the prosecutor when he asked the judge to set bond for this new charge.

Even if these actions were in violation of defendant's rights, we would certainly not dismiss the charges against him. "No case should be dismissed for the violation of a defendant's statutory rights unless, at the very least, these violations cause irreparable prejudice to the defendant's preparation of his case." *State v. Knoll*, 84 N.C. App. 228, 231, 352 S.E.2d 463, 465 (1987), *reversed on other grounds*, 322 N.C. 535, 369 S.E.2d 558 (1988).

Defendant argues that he was prejudiced because he was deprived of opportunities to gather crucial evidence and search out witnesses on his behalf. Defendant was first arrested on 22 September 1994 and was released after posting bond that same day. His second arrest occurred on 13 October 1994. He had approximately three weeks after his initial release from custody to gather evidence while it was fresh in potential witnesses' minds. Even if the actions of the prosecutor were improper, we hold that defendant has not made a sufficient showing of prejudice to warrant dismissal of the charges against him.

[2] Defendant also assigns error to the action of the trial court denying his motion in limine to prohibit the State from cross-examining him about a fourteen-year-old prior Florida conviction for involuntary sexual battery and burglary. He argues that this ruling violates N.C.R. Evid. 609(b) and had a chilling effect on his decision whether to testify.

At trial, the State conceded that the conviction was more than ten years old, so the only issue for our determination is whether the pro-

STATE v. HUNT

[123 N.C. App. 762 (1996)]

bative value of the conviction substantially outweighs its prejudicial effect. See N.C.R. Evid. 609(b) (1992).

In *Luce v. United States*, 469 U.S. 38, 83 L. Ed. 2d 443 (1984), the United States Supreme Court held that, in order "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." 469 U.S. at 43, 83 L. Ed. 2d at 448. The Court reasoned that, in order to accomplish the required task of weighing "the probative value of a prior conviction against the prejudicial effect to the defendant," a court "must know the precise nature of the defendant's testimony." *Id.* at 41, 83 L. Ed. 2d at 447. The Court logically concluded that this cannot be known when the defendant does not testify. *Id.*

The rule of evidence at issue in *Luce* is Federal Rule 609(a). Although other state courts have adopted the reasoning in *Luce* and applied it to cases arising under their versions of Rule 609(b), which are identical to our rule, see *Vaupel v. State*, 708 P.2d 1248, 1250 (Wyo. 1985); see also *Richardson v. State*, 832 S.W.2d 168, 172 (Tex. Ct. App. 1992), the applicability of *Luce* to our Rule 609(b) has not previously been determined by an appellate court of this State.

In *State v. Lamb*, 84 N.C. App. 569, 353 S.E.2d 857 (1987), *aff'd*, 321 N.C. 633, 365 S.E.2d 600 (1988), this Court considered *Luce*'s applicability to an appeal under N.C.R. Evid. 608(b). After granting the State's petition for discretionary review, the Supreme Court expressed no opinion on the *Luce* issue, *State v. Lamb*, 321 N.C. 633, 646, 365 S.E.2d 600, 607 (1988), and therefore left this Court's analysis intact.

In *Lamb*, this Court distinguished *Luce* "since no weighing of probative value and prejudicial effect was necessary." *Lamb*, 84 N.C. App. at 583, 353 S.E.2d at 865. The Court further distinguished *Luce* because the record indicated that the defendant intended to testify but for the ruling, *id.* at 581, 353 S.E.2d at 864, thereby disagreeing with *Luce*'s observation that the decision to testify "seldom turns on the resolution of one factor." *Luce*, 469 U.S. at 42, 83 L.E.2d at 448. The *Lamb* Court also made statements to the effect that requiring defendants to testify in order to preserve rulings on motions in limine was inadvisable since it would "render[] motions *in limine* ineffective." *Lamb*, 84 N.C. App. at 581, 353 S.E.2d at 864. However, these later statements are not necessary to the Court's decision and are therefore dicta. See *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion

STATE v. HUNT

[123 N.C. App. 762 (1996)]

not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.”)

The present case is distinguishable from *Lamb*. The rule of evidence at issue, Rule 609(b), does require the weighing of probative value and prejudicial effect. Therefore, even if the record reveals defendant’s intent to testify were it not for the ruling, his or her testimony is still necessary to enable our review of the required balancing test. We cannot determine whether error occurred under Rule 609(b) without it.

In *State v. Norris*, 101 N.C. App. 144, 398 S.E.2d 652 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991), while not directly applying *Luce* to Rule 609(b) cases, this Court intimated that certain concerns raised by *Luce* were important considerations when deciding such cases. *See Norris*, 101 N.C. App. at 148-49, 398 S.E.2d at 655. Since we find defendant’s testimony to be central to our review of cases arising under North Carolina Rule 609(b), we now adopt aspects of the *Luce* decision and its reasoning for application to 609(b) cases.

N.C.R. Evid. 609(b) states:

Evidence of a conviction . . . is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. . . .

N.C.R. Evid. 609(b). This rule, like the one at issue in *Luce*, requires the court to conduct a balancing test. The only difference between the two tests is that while our rule requires the probative value to “substantially outweigh” the prejudicial effect, Federal Rule 609(a) merely requires the probative value to “outweigh” the prejudicial effect. *See Fed. R. Evid. 609(a)* (1987).

However, this distinction does not preclude our applying the *Luce* rule to cases arising under our Rule 609(b) and requiring defendants to testify in order to preserve such rulings for appeal. In fact, the distinction may actually make the need for defendants’ testimony more compelling in cases arising out of Rule 609(b). In *Vaupel*, the Wyoming Supreme Court recognized this fact and reasoned that

STATE v. HUNT

[123 N.C. App. 762 (1996)]

because Rule 609(b) has the additional requirement that the probative value substantially outweigh the prejudicial effect, "[t]he factual circumstances of a case necessary to properly weigh the probative value against prejudicial effect are even more important under Rule 609(b) than Rule 609(a)." 708 P.2d at 1250. Therefore, the *Vaupel* Court ruled that "the policy considerations behind *Luce* are equally, if not more, applicable to Rule 609(b), and the potential problems even greater." We agree.

As recognized by the *Luce* Court, in order to adequately review the careful weighing of probative value and prejudicial effect necessitated by an evidentiary rule, an appellate court must consider the factual context of the entire trial. This includes the testimony of the defendant and would be incomplete without it. Additionally, in the absence of a defendant's testimony, any potential harm is purely speculative. The prosecution may decide not to use the conviction; or since a motion in limine is a "preliminary . . . decision which the trial court can change if circumstances develop which make it necessary," *State v. Lamb*, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988), the trial court may decide to reverse its prior ruling. We hold that in order to preserve rulings made under North Carolina Rule of Evidence 609(b) for appeal, a defendant must testify.

In this case, defendant did not testify. We are left to speculate as to what the nature of his testimony would have been had he done so. Defendant elicited testimony from one witness tending to show that he believed the incident was consensual and from another that it may have been a case of mistaken identity. Without knowing which theory defendant would have pursued, we cannot determine the extent of the prejudice or probative value of defendant's prior conviction.

We hold that since defendant did not testify, he did not preserve this issue for our review and we therefore affirm the trial court's ruling.

No error.

Judges EAGLES and McGEE concur.

J. M. SMITH CORP. v. MATTHEWS

[123 N.C. App. 771 (1996)]

J.M. SMITH CORPORATION D/B/A SMITH DRUG COMPANY, PLAINTIFF v. MILDRED FIELDS MATTHEWS, INDIVIDUALLY AND D/B/A A-B PHARMACY, MEDICAL ASSOCIATES PHARMACY OF ASHEVILLE LP, MEDICAL ASSOCIATES OF AMERICA, INC., DEFENDANTS

No. COA95-1159

(Filed 17 September 1996)

1. Courts § 145 (NCI4th)—conflict of laws—security agreement specifying S.C. law—open account not specified—resolved under N.C. law

The resolution of issues involving an open account for pharmaceutical supplies was controlled by North Carolina law where the parties had established an account and entered into a security agreement pursuant to the account. Construed under South Carolina law, as the security agreement required, the obligation arose under the open account and not under the security agreement; there is nothing in the record indicating any agreement as to the controlling law on the open account and the resolution of the action on the account is controlled by North Carolina law.

Am Jur 2d, Conflict of Laws § 82.

2. Accounts and Accounts Stated § 14 (NCI4th)— open account—pharmaceutical supply—pharmacy sold—pharmaceuticals supplied under old account

Summary judgment should have been granted for defendant in an action arising from the provision of pharmaceutical supplies by plaintiff to a pharmacy owned by defendant Matthews where the parties had established an account; defendant or her employees placed orders with plaintiff on a daily basis and made weekly payments for the outstanding balance to plaintiff's sales representative; defendant Matthews sold the pharmacy and remained an employee of the store; defendant's evidence showed that plaintiff's sales representative went to the pharmacy and was informed of the sale and that arrangements would have to be made through the store's new owners, the sales representative spoke with the representative of the new owners and told defendant that the new owners would be setting up an account with a different supplier but would continue ordering from plaintiff until the new account was established, and the sales representative thereafter never looked to defendant for payment; plaintiff's evidence was that

J. M. SMITH CORP. v. MATTHEWS

[123 N.C. App. 771 (1996)]

plaintiff failed to establish a new account for the new owners but delivered pharmaceutical products and continued to charge to the old open account; and a balance of \$20,170.79 was created which has not been paid. Plaintiff had reasonable notice and was imputed with the knowledge of its agent, the sales representative, that it could no longer charge pharmaceuticals to defendant's open account. Even if defendant did not give reasonable notice that she was terminating her open account, plaintiff was notified through its agent that defendant had sold or would be selling the pharmacy and had a duty to mitigate damages, but continued to ship pharmaceuticals and charge defendant's account.

Am Jur 2d, Accounts and Accounting §§ 4-7.

Appeal by defendant from order entered 21 June 1995 by Judge James R. Strickland in Buncombe County Superior Court. Heard in the Court of Appeals 23 May 1996.

McGuire, Wood & Bissette, P.A., by T. Douglas Wilson, Jr., for plaintiff appellee.

Devere Lentz & Associates, by John M. Olesiuk, for defendant appellant.

SMITH, Judge.

Defendant Matthews owned A-B Pharmacy in Asheville, North Carolina. In the course of operating A-B Pharmacy, defendant established an account to purchase pharmaceutical supplies from plaintiff. Pursuant to such account, the parties entered into a security agreement granting plaintiff a security interest in defendant's inventory, accounts receivable, furniture, fixtures and equipment and in all proceeds from the sale of any of the collateral named in the agreement. The security agreement further provided that it could not be *modified or amended except* in writing by the parties. The account that plaintiff and defendant set up was otherwise an open account. Defendant, or one of her employees placed orders with plaintiff on a daily basis. It was the parties' custom and practice for defendant to make weekly payments for the outstanding balance to plaintiff's sales representative. This custom of frequent orders and weekly payments continued for more than three-and-one-half years while defendant owned the pharmacy. Additional facts necessary to the disposition of this case are discussed later in this opinion.

J. M. SMITH CORP. v. MATTHEWS

[123 N.C. App. 771 (1996)]

On 13 February 1995, plaintiff filed this action against Medical Associates and defendant Matthews. Plaintiff and defendant Matthews both moved for summary judgment with supporting affidavits. On 21 June 1995, the trial judge granted plaintiff's motion and entered judgment against defendant Matthews in the amount of \$20,170.79, plus pre- and post-judgment interest. The trial court further denied defendant Matthews' motion for summary judgment. Defendant Matthews subsequently voluntarily dismissed her cross claims against codefendants in this action. From the summary judgment order, defendant Matthews appeals.

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In passing upon a motion for summary judgment, the court must view the evidence presented by both parties in the light most favorable to the nonmoving party. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665-66, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). After reviewing the forecast of evidence of record, we disagree with the trial court and determine that summary judgment should have been granted in favor of defendant.

[1] As a preliminary matter, we note that the security agreement between the parties contains the following provision: "6. Governing Law. This agreement is being executed and delivered in the State of South Carolina and shall be construed in accordance with and governed by the laws of said State." When the security agreement is construed in accordance with South Carolina law, it is obvious that the obligation to pay for the pharmaceutical supplies arose under the open account between the parties and not under the security agreement. "The debt was not created by the security agreement nor [is] its validity dependent on the existence or enforceability of the security agreement." *Hyload, Inc. v. Pre-Engineered Products, Inc.*, 417 S.E.2d 622, 625 (S.C. Ct. App. 1992). "This [is] not an action to enforce rights in collateral, but an action for a money judgment against the debtor." *Id.* Though the security agreement is governed by South Carolina law, there is nothing in the record indicating any agreement as to the controlling law on the open account. Where the transaction bears a reasonable relation to more than one state, the U.C.C. permits the parties to agree with respect to which state's law shall govern their rights and duties. *Wohlfahrt v. Schneider*, 82 N.C. App. 69, 74,

J. M. SMITH CORP. v. MATTHEWS

[123 N.C. App. 771 (1996)]

345 S.E.2d 448, 451 (1986); N.C. Gen. Stat. § 25-1-105(1) (1995). South Carolina has also adopted the U.C.C. *Draffin v. Chrysler Motors Co.*, 166 S.E.2d 305, 306 n.1 (S.C. 1969). However, “[w]here there is no agreement as to the governing law, the Act is applicable to any transaction having an ‘appropriate’ relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act.” See N.C. Gen. Stat. § 25-1-105 Amended Official Comment. Our Courts have interpreted “appropriate relation” to mean “most significant relationship.” *Boudreau v. Baughman*, 322 N.C. 331, 338, 368 S.E.2d 849, 855 (1988). Therefore, because the pharmaceutical supplies were ordered in North Carolina, delivered in North Carolina, paid for in North Carolina and sold in North Carolina, we hold that the transaction bears an appropriate relation to North Carolina. Accordingly, resolution of the substantive issues in this case in the action on the account is controlled by North Carolina law.

[2] “[North Carolina] follows the generally accepted view that a contract of indefinite duration may be terminated by either party on giving reasonable notice.” *City of Gastonia v. Duke Power Co.*, 19 N.C. App. 315, 317, 199 S.E.2d 27, 29 (citations omitted), *cert. denied*, 284 N.C. 252, 200 S.E.2d 652 (1973). “To avoid injustice, however, this rule is subject to the qualification that such a contract may not be unilaterally terminated until it has been in effect for a reasonable time, taking into account the purposes the parties intended to accomplish.” *Id.* at 318, 199 S.E.2d at 29-30. Succinctly stated, the North Carolina rule is as follows:

“As a general rule, where no time is fixed for the termination of a contract it will continue for a reasonable time, taking into account the purposes that the parties intended to accomplish; and where the duration of the contract cannot be implied from its nature and the circumstances surrounding its execution, the contract is terminable at will by either party on reasonable notice to the other.”

Id. at 318, 199 S.E.2d at 30 (citation omitted).

The open account established between the parties appears to be the result of an oral agreement. There is no evidence that any time limitation was put on the account by the parties. The account was in existence for over three-and-one-half years while defendant owned A-B Pharmacy. An ordinary open account results where the parties intend for individual transactions to be considered as a connected

J. M. SMITH CORP. v. MATTHEWS

[123 N.C. App. 771 (1996)]

series rather than as independent of each other, and a balance is kept by adjustment of debits and credits and further dealings between the parties are contemplated. *Electric Service, Inc. v. Sherrod*, 293 N.C. 498, 503, 238 S.E.2d 607, 611 (1977) (citing *McKinnie Bros. v. Wester*, 188 N.C. 514, 125 S.E. 1 (1924)).

From the record it is obvious that defendant *terminated* her open account to purchase pharmaceuticals and that she *revoked* any authority plaintiff had to ship pharmaceuticals to the A-B pharmacy and bill her account. "A principal is chargeable with and bound by the knowledge of or notice to his agent, received while the agent is acting as such within the scope of his authority and in reference to which his authority extends." *Roberts v. Memorial Park*, 281 N.C. 48, 60, 187 S.E.2d 721, 728 (1972) (citing *Norburn v. Mackie*, 262 N.C. 16, 136 S.E.2d 279 (1964)). Plaintiff was reasonably notified and bound by the knowledge of its agent McElreath that it did not have the authority to take orders from the new owners and charge them to defendant Matthews' open account.

Defendant Matthews' evidence shows that, on or about 1 March 1993, she sold the A-B Pharmacy to Medical Associates and she remained an employee of the store thereafter. In early March of 1993 plaintiff's sales representative, McElreath, went to the A-B Pharmacy for his weekly visit, and defendant informed McElreath that she had sold her business to Medical Associates. She further advised McElreath that, if plaintiff wished to continue providing pharmaceuticals to A-B Pharmacy, arrangements had to be made through the store's new owners. McElreath spoke with Cummins, the representative of the new owners, Medical Associates, and then told defendant that Medical Associates would be setting up an account with a different pharmaceutical supplier, but Medical Associates would continue ordering from plaintiff until the new account was established. Thereafter, McElreath never looked to defendant for payment as had been the practice on a weekly basis for the previous three-and-one-half years prior to the conversation regarding defendant's sale of the pharmacy. Mary Jane Jarrett was present during the conversations with McElreath. She was an employee of Medical Associates after 1 March 1993. She placed orders for pharmaceuticals on a daily basis with plaintiff and signed for the drugs when they were delivered to the store. After 1 March 1993 defendant became an employee of the A-B Pharmacy and had no authority to issue or to sign checks on behalf of the new owners Medical Associates.

J. M. SMITH CORP. v. MATTHEWS

[123 N.C. App. 771 (1996)]

Plaintiff's evidence shows that, on or about 1 March 1993 during McElreath's normal sales call to the A-B Pharmacy, defendant informed McElreath that she was selling the pharmacy to Medical Associates, but she would remain as an employee of the pharmacy. During McElreath's visit, defendant introduced McElreath to Cummins the representative of Medical Associates. Cummins advised McElreath that Medical Associates had a contract with another national competitor and would not be buying any products from plaintiff. Thereafter, plaintiff failed to establish a new account with Medical Associates. During March and April 1993, plaintiff delivered pharmaceutical products to Medical Associates and continued to charge the pharmaceuticals to the A-B Pharmacy open account under which it had sold pharmaceuticals to defendant when she owned the store. A balance of \$20,170.79 was created, and neither defendant nor Medical Associates have paid this amount to plaintiff.

Taking this forecast of evidence in the light most favorable to defendant, we hold that plaintiff had reasonable notice and was imputed with the knowledge of its agent McElreath that it could no longer charge pharmaceuticals to defendant's open account. Therefore, defendant is entitled to judgment as a matter of law.

"The rule in North Carolina is that an injured plaintiff, whether his case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any party of the loss incident to such failure, *no recovery can be had*. This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable."

Radford v. Norris, 63 N.C. App. 501, 502, 305 S.E.2d 64, 65 (1983) (citations omitted) (emphasis added), *appeal after remanded*, 74 N.C. App. 87, 327 S.E.2d 620, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985) (Appeal after remand not relevant to this case.). Thus, even if defendant did not give reasonable notice that she was terminating her open account with plaintiff, plaintiff, through its agent, was notified that defendant Matthews had either sold, or would be selling A-B Pharmacy to Medical Associates and had a duty to mitigate its damages. However, plaintiff continued to ship pharmaceuticals to A-B Pharmacy and to charge defendant's account in the amount of \$20,170.79.

CRAFT v. BILL CLARK CONSTRUCTION CO.

[123 N.C. App. 777 (1996)]

We hold that plaintiff, as a matter of law, had reasonable notice that their agreement to charge pharmaceuticals to defendant's open account was terminated, and that defendant is entitled to judgment as a matter of law. The order of the trial court granting summary judgment in plaintiff's favor and denying defendant Matthews' motion for summary judgment is reversed and the case is remanded for entry of summary judgment for defendant Matthews.

Judges EAGLES and WYNN concur.

BILLY P. CRAFT, EMPLOYEE, PLAINTIFF v. BILL CLARK CONSTRUCTION COMPANY,
EMPLOYER, SELECTIVE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA95-1184

(Filed 17 September 1996)

1. Workers' Compensation § 261 (NCI4th)— calculation of compensation—wages for less than 52 weeks before injury

The Industrial Commission did not err in determining compensation in a workers' compensation action by using plaintiff's 1994 wages to the time of injury divided by the number of weeks worked where plaintiff worked as needed and was paid by the job, he was injured on 22 March 1994, and the Commission determined that it was not fair to calculate plaintiff's average weekly wages by dividing the wages received from March 1993 to March 1994 by the number of weeks worked. Although that determination must be supported by evidence in the record to be binding on appeal, it is deemed supported here because there was no assignment of error to the issue and appellate review is precluded. The Commission was therefore free to use an alternate method for measuring plaintiff's average weekly wages and the wages earned in the last two and one-half months prior to the injury are a reasonable approximation of the wages which the employee would be earning if not for the injury. N.C.G.S. § 97-2(5).

Am Jur 2d, Workers' Compensation §§ 418-430.

CRAFT v. BILL CLARK CONSTRUCTION CO.

[123 N.C. App. 777 (1996)]

2. Workers' Compensation § 263 (NCI4th)— calculation of compensation—expenses not deducted from wages—no evidence—determination of unfairness

The Industrial Commission did not err in a workers' compensation action in its computation of plaintiff's average wages in not deducting expenses incurred in earning those wages where there was no evidence that plaintiff sustained any expenses in the time period used to compute the average weekly wages. Even if such expenses had been incurred, the Commission is not required to deduct those expenses if it does not believe that this method produces a result fair to the employer and employee and the Commission here specifically stated that it believed it would be unjust and unfair to treat plaintiff as a subcontractor. This language indicates that the Commission did not consider it fair to deduct expenses and, because the record can support that determination, it is binding on appeal.

Am Jur 2d, Workers' Compensation §§ 418-430.

Appeal by defendants from Opinion and Award for the Full Commission filed 19 June 1995. Heard in the Court of Appeals 21 August 1996.

Hugh D. Cox for plaintiff-appellee.

Young Moore & Henderson, P.A., by Joe E. Austin, Jr., for defendant-appellants.

GREENE, Judge.

Bill Clark Construction Company (employer) and Selective Insurance Company (collectively defendants) appeal the Opinion and Award for the North Carolina Industrial Commission (Commission) requiring that defendants compensate Billy Craft (plaintiff) at a rate of \$189.00 per week.

At the hearing to resolve plaintiff's average weekly wage, evidence was presented showing that plaintiff worked for employer when the employer needed jobs done and not on a full-time basis. Plaintiff was paid by the job according to the work he was doing at a particular time. In performing the work in 1993, which was done in March, May, November and December, he was paid \$15,614 and incurred expenses related to the job performance in the amount of \$8,234, plus \$1,267 in depreciation expense. In 1994, the plaintiff was

CRAFT v. BILL CLARK CONSTRUCTION CO.

[123 N.C. App. 777 (1996)]

paid \$3,230 by employer for work performed from 1 January through the date of his injury on 22 March. There was no evidence of the expenses incurred, if any, by the plaintiff during 1994.

The Deputy Commissioner used plaintiff's income from 1993 and deducted plaintiff's expenses incurred in that year to arrive at a net income of \$6,113, which amounted to an average weekly income of \$117.56. The Deputy Commissioner did not use plaintiff's earnings from 1994 because "[t]here is no evidence of . . . expenses" for that period of time.

On appeal, the Commission calculated the average weekly income, using only the wages received in 1994 and dividing that sum by the number of weeks worked in 1994. It concluded this method to be "fair and just to both parties." The Commission refused to deduct the plaintiff's expenses incurred in the earning of that income, finding that "it would be unjust and unfair to treat plaintiff employee as a sub-contractor."

The issues presented are whether the calculation of the plaintiff's average weekly wages required the Commission to (I) compute the total of the wages the plaintiff received from the employer in 1993 and 1994; and (II) deduct the expenses the plaintiff incurred in earning that income.

I

[1] Our Workers' Compensation Act provides several methods for determining an employee's "average weekly wages." N.C.G.S. § 97-2(5) (1991). If an employee has worked for an employer for less than fifty-two weeks, as in this case, the average weekly wages are to be determined by "dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages." *Id.* If, however, it is determined that this method would not be "fair and just" to both parties, "such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." *Id.*; see *Wallace v. Music Shop*, 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971). This "other method" does not seek to establish some precise formula, but instead merely "sets up a standard to which results fair and just to both parties must be related." *Liles v. Electric Co.*, 244 N.C. 653, 658, 94 S.E.2d 790, 794 (1956).

CRAFT v. BILL CLARK CONSTRUCTION CO.

[123 N.C. App. 777 (1996)]

In this case, the Commission determined that it was not fair to calculate the plaintiff's average weekly wages by dividing the wages received during the entire period, extending from March 1993 into March 1994, by the number of weeks worked. This determination, to be binding on this Court, must be supported by the evidence in the record. *Id.* at 660, 94 S.E.2d at 796. Because, however, there has been no assignment of error to this determination, it is deemed to be supported in the record, as appellate review of this issue is precluded. N.C. R. App. P. 10(a) (1996); *Harris v. Harris*, 307 N.C. 684, 690, 300 S.E.2d 369, 373 (1983) (scope of review limited to consideration of assignments of error). The Commission was therefore free to use an alternate method for measuring the plaintiff's average weekly wages and the wages earned in the last two and one-half months prior to the injury are a reasonable "approximation" of the wages "which the employee would be earning were it not for the injury." The use of the average of the 1994 wages to calculate the plaintiff's average weekly wages was therefore not error.

II

[2] In so holding we also reject the employer's argument that the Commission erred in its computation of the plaintiff's average wages in that it did not deduct the expenses the plaintiff incurred in earning those wages. There is no evidence that the plaintiff sustained any expenses in 1994, the time period used to compute the average weekly wages. Even if such expenses had been incurred by the plaintiff, the Commission is not required to deduct those expenses from the income earned to properly calculate the average weekly wages. This Court has held that when an employee is paid a set price for doing a particular job, it is proper to deduct the "expenses incurred in producing [that] revenue" in calculating the average weekly wages. *Baldwin v. Piedmont Woodyards, Inc.*, 58 N.C. App. 602, 604, 293 S.E.2d 814, 816 (1982) (plaintiff sold pulpwood to the employer "for a certain price per cord"). Even in this latter situation, however, the Commission is not required to deduct the expenses incurred by the plaintiff if it does not believe that this method "produces a result fair to the employer and employee." *Id.*

In this case, the Commission specifically stated that it believed it "would be unjust and unfair to treat plaintiff employee as a subcontractor." This language indicates that the Commission did not consider it fair to deduct from the plaintiff's income any expenses he may have sustained in the earning of that income. Because the record can

HURLEY v. HURLEY

[123 N.C. App. 781 (1996)]

support that determination, we are bound by it. Accordingly, the Commission's refusal to deduct the plaintiff's expenses, if any, in its average weekly wages calculation was not error.

We have considered and overrule without discussion the employer's assignment of error with respect to the interest the employer was ordered to pay on the award.

Affirmed.

Judges JOHN and MARTIN, Mark D., concur.

DEBORAH C. HURLEY (CRAFT), PLAINTIFF-APPELLEE v. DAVID L. HURLEY,
DEFENDANT-APPELLANT

No. COA95-1213

(Filed 17 September 1996)

**Divorce and Separation § 4 (NCI4th)— settlement agreement
—oral stipulations by attorneys in open court—not binding**

A trial court order holding that an earlier oral stipulation as to marital and property rights was binding was vacated and remanded where there was no evidence in the record that the stipulation was ever reduced to writing and thereafter duly executed and acknowledged, the trial court made no contemporaneous inquiry of the parties, and the parties were absent from the courtroom at the time the oral stipulation was stated on the record. Inquiry must be made of the parties themselves, not of the parties' attorneys or representatives, and that inquiry must be made contemporaneously with the entry of the oral stipulations.

Am Jur 2d, Divorce and Settlement §§ 819 et seq.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by circumstances surrounding execution—modern status. 53 ALR4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms—modern status. 53 ALR4th 161.

HURLEY v. HURLEY

[123 N.C. App. 781 (1996)]

Appeal by defendant from order entered 14 July 1995 by Judge Charles L. White in Guilford County District Court. Heard in the Court of Appeals 22 August 1996.

On 23 November 1993, plaintiff filed a complaint seeking, *inter alia*, temporary and permanent alimony, divorce from bed and board, and injunctive relief with regard to marital property. Thereafter, on 11 January 1994, the parties through counsel entered stipulations of settlement orally in open court. The parties themselves were not present in court when these stipulations were announced before the court, but an official court reporter recorded the oral stipulations and defense counsel informed the court that the oral stipulations would be memorialized in a consent order to be signed by the parties.

As the parties attempted to draft a mutually agreeable consent order, a dispute arose regarding the legal effect of the oral stipulations. Plaintiff then filed a motion to show cause seeking to have the court enforce the terms of the orally stipulated settlement agreement. On 14 July 1995, Judge Charles L. White entered an order holding that the oral stipulations were binding upon the parties.

Defendant appeals.

Barbara R. Morgenstern for plaintiff-appellee.

Gabriel Berry & Weston, L.L.P., by M. Douglas Berry, for defendant-appellant.

EAGLES, Judge.

The sole issue on appeal is whether oral stipulations in open court as to marital and property rights are valid when entered by the parties' attorneys without the parties themselves being present. Defendant argues that, unless the parties themselves were present, these oral stipulations are invalid. We agree.

In *McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985), this Court held that

the same scrutiny which is applied to separation agreements must also be applied to stipulations entered into by a husband and a wife regarding the distribution of their marital property. Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. If, as in the case *sub judice*, oral stipulations are not reduced to writing it must affirmatively appear in

HURLEY v. HURLEY

[123 N.C. App. 781 (1996)]

the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will.

Id. This language is clear. Inquiry must be made of the parties themselves, not of the parties' attorneys or representatives, and that inquiry must be made contemporaneously with the entry of the oral stipulations. Accordingly, we conclude under *McIntosh* that, absent a reduction of the agreement to a duly executed and acknowledged writing, the trial court must contemporaneously inquire of the parties themselves as to their understanding of the legal effect of the agreement. *Id.*

Here, we find no evidence in the record that the stipulation was ever reduced to writing and thereafter duly executed and acknowledged. The trial court here also made no contemporaneous inquiry of the parties, the parties having been absent from the courtroom at the time the oral stipulation was stated on the record. Incidentally, within less than three months after counsel entered the oral stipulation, the parties clearly evinced that they interpreted their alleged agreement differently and that each objected to the other's interpretation.

In sum, we conclude that *McIntosh* is controlling on this issue and not subject to exception on the facts of this case. As we have stated:

[T]here is no evidence that the terms of the stipulation were reduced to writing. Notwithstanding any reference by the parties or the court to the stipulation, we find it was incumbent upon the court, according to *McIntosh*, to make inquiries and ascertain whether or not the parties fully understood their actions in entering into a stipulation. In the absence of any evidence of such inquiries, we must vacate and remand.

Aycock v. Aycock, 113 N.C. App. 834, 835, 440 S.E.2d 282, 282-83 (1994).

Vacated and remanded.

Judges WALKER and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 AUGUST 1996

ANGEL v. N.C. DEPT. OF TRANSPORTATION No. 96-131	Yadkin (95CVS61)	Affirmed
BEEH v. MILLIGAN No. 96-88	Onslow (93CVS2181)	Affirmed
BELL v. HARDY No. 95-791	Bertie (94CVS1)	Affirmed
BELL v. HARDY No. 95-792	Bertie (94CVS134)	Affirmed
BISHOP v. MEMORIAL MISSION HOSPITAL No. 95-1195	Buncombe (92CVS3859)	No Error
COLEY v. TAYLOR No. 96-276	Wilson (92CVS1862)	No Error
H & M DIVERSIFIED INVESTMENTS v. DICKERSON REALTY CORP. No. 95-311	Wake (93CVS11219)	Affirmed
HAWKINS v. KANE No. 96-240	Ind. Comm. (216081)	Affirmed
HOGAN v. THOMAS No. 95-764	Duplin (92CVS652)	No Error
IN RE MOORE No. 95-933	Buncombe (93J399)	Affirmed
IN RE WEYERHAEUSER No. 95-1168	Property Tax Comm. (94PTC59)	Affirmed
MYLES v. CITY OF RALEIGH No. 95-877	Wake (94CVS03739)	Affirmed
NATIONSBANK v. WHITE-HUFF MFG. CO. No. 95-694	Mecklenburg (92CVS7619)	No Error
NOONKESTER v. DOE No. 95-1111	Mecklenburg (93CVS6486)	Affirmed
PARAMORE v. LILLEY No. 96-257	Beaufort (95CVS99)	Reversed and Remanded

PROFESSIONAL NURSING SERVICES v. DEPT. OF HUMAN RESOURCES No. 95-893	NCDHR (94DHR0609)	Affirmed
RALDEN v. VIENNE No. 95-1181	Durham (95CVS1668)	Affirmed
ROSER v. ROSER No. 95-1141	Davidson (86CVD1203)	Affirmed in part, reversed in part and remanded
SANDERS v. SANDERS No. 96-81	Cumberland (94CVD7339)	Reversed and Remanded
SHAW FOOD SERVICES v. MOREHOUSE No. 95-1064	Wake (91CVS7409)	Affirmed
SMITH v. ECKERD No. 96-5	Forsyth (88CVS40)	Affirmed
STATE v. AMON No. 96-136	Burke (93CRS7803) (94CRS3527)	No Error
STATE v. ARMSTRONG No. 96-190	New Hanover (95CRS6299) (95CRS6300)	Affirmed
STATE v. BURCH No. 96-360	Forsyth (94CRS34268)	No Error
STATE v. BUTLER No. 96-219	Gaston (94CRS21060) (94CRS21061) (94CRS21062) (94CRS21063) (94CRS21064)	No Error
STATE v. DAYE No. 96-165	Forsyth (93CRS45411)	No Error
STATE v. FERNANDEZ No. 95-968	Onslow (91CRS22901) (91CRS22902) (91CRS22903) (91CRS22904) (91CRS22905)	Affirmed
STATE v. FEWELL No. 95-912	Mecklenburg (94CRS306) (94CRS30178) (94CRS30179)	No Error

STATE v. FOWLER No. 96-124	Caldwell (93CRS3641)	No Error
STATE v. GRAY No. 95-1211	Wake (89CRS43707)	Affirmed
STATE v. GREENHILL No. 96-147	Haywood (94CRS5402)	Appeal Dismissed
STATE v. HOLLIFIELD No. 96-279	Buncombe (95CRS57359)	Affirmed
STATE v. HOLLOMAN No. 95-1396	Hertford (93CRS1850) (93CRS1851)	No Error
STATE v. JOHNSON No. 96-64	Mecklenburg (94CRS62392)	No Error
STATE v. LOWDER No. 96-48	Curituck (93CRS984) (93CRS985) (93CRS1811)	No Error
STATE v. McKENDALL No. 96-328	Lee (95CRS1242)	No Error
STATE v. McMAHON No. 96-280	Buncombe (95CRS58495)	Affirmed
STATE v. MORGAN No. 96-91	Robeson (93CRS20549) (93CRS20550)	No Error
STATE v. MURPH No. 96-193	Alamance (92CRS30558)	Remanded
STATE v. PAYNE No. 96-28	Mecklenburg (94CRS5447)	No Error
STATE v. PRIESTER No. 96-281	Buncombe (95CRS58139) (95CRS58140)	Affirmed
STATE v. PRUDHOMME No. 96-87	New Hanover (94CRS5426)	Affirmed
STATE v. SAUNDERS No. 96-272	Catawba (91CRS8212)	No Error
STATE v. TAYLOR No. 96-173	Ashe (95CRS1369)	No Error
STATE v. WOODS No. 96-264	Mecklenburg (94CRS40810)	Affirmed

TUTTLE v. HARRIS No. 95-990	Davidson (93CVS1322)	Affirmed
UNITY BANK & TRUST CO. v. KEETER No. 95-233	Halifax (94CVS317)	Reversed
WAKE COUNTY v. JAMES No. 95-1431	Wake (90CVD12864)	Reversed and Remanded
WHITT v. WHITT No. 96-320	Chatham (94CVD34) (94CVD414)	Affirmed

FILED 3 SEPTEMBER 1996

AETNA CASUALTY & SURETY CO. v. PRESTIGE FABRICATORS No. 95-710	Randolph (93CVS1137)	No Error
ALPISER v. ANDREW No. 95-1136	Wake (93CVS10837)	No Error
BRYSON v. PHIL CLINE TRUCKING No. 96-139	Ind. Comm. (430372)	Appeal Dismissed
CASEY v. BLYTHE CONSTRUCTION, INC. No. 95-1058	Mecklenburg (93CVS14462)	Affirmed
CIESZKO CONSTRUCTION CO. v. PIERCE No. 96-307	Craven (93CVS336)	Vacated and remanded in part; Affirmed in part
CLARK v. CLARK No. 95-1069	Henderson (93CVD460) (94CVD626)	Affirmed in part, Reversed in part and remanded
CRISSMAN v. BROWN No. 95-1088	Alamance (92CVS2389)	No Error in part; Remanded in part
DANSEY v. EVANS No. 95-266	Pitt (92CVS2500)	Affirmed
FERGUSON v. ITHACA INDUSTRIES No. 95-1163	Ind. Comm. (246637)	Affirmed

FIRST UNION NAT. BANK v. ELY No. 95-795	Mecklenburg (94CVD10854)	Reversed and Remanded
HANFORD'S, INC. v. HOYES No. 96-61	Mecklenburg (92CVS14568)	Vacated and Remanded
HARTWELL v. COUNTY OF DAVIDSON No. 96-36	Davidson (95CVS950)	Dismissed
HOUSING AUTH. OF WINSTON-SALEM v. COTTRELL No. 95-882	Forsyth (95CVD844)	Reversed and Remanded
IN RE FLAD No. 96-146	Pender (93J001)	Affirmed
JONES v. JONES No. 95-1221	Mecklenburg (89CVD10777)	Affirmed
LOY v. LOY No. 95-938	Gulford (88CVD4289)	Affirmed
NANCE v. NANCE No. 95-191	Robeson (91CVD2636)	Affirmed in part, Reversed in part and remanded
NEALLY v. CAMPBELL SOUP CO. No. 96-396	Harnett (93CVS00565)	Appeal Dismissed
SCHWAB v. KILLENS No. 95-1127	Mecklenburg (94CVS13963)	Reversed
SCIULLO v. N.C. STATE BD. OF ED. No. 96-342	Guilford (94CVS7959)	Dismissed
STATE v. BODDIE No. 96-298	Craven (95CRS6697)	Affirmed
STATE v. GILL No. 96-354	Wake (94CRS82720)	No Error
STATE v. HALL No. 96-33	Wayne (90CRS15910)	No Error
STATE v. KING No. 96-370	Surry (95CRS4103) (95CRS7813)	No Error
STATE v. NICKERSON No. 96-196	Durham (95CRS1872)	No Error

STATE v. OLIVER No. 96-126	Buncombe (95CRS33) (94CRS6614)	No Error
STATE v. SELF No. 96-244	Cumberland (92CRS44544)	No Error
STATE v. SMITH No. 96-266	Henderson (94CRS5981)	No Error
STATE v. STEWART No. 96-381	Mecklenburg (94CRS079186)	No Error
STATE v. THOMAS No. 96-411	New Hanover (95CRS19540) (95CRS19709)	No Error
STATE v. TYSON No. 95-1192	Forsyth (93CRS31730) (93CRS30208)	No Prejudicial Error
STATE v. WILDER No. 96-358	Durham (95CRS634)	No error in the trial; Remanded for resentencing
STOREY v. W. R. GRACE CO. No. 95-801	Ind. Comm. (122396)	Reversed and Remanded
TERRY v. ARATEX SERVICES No. 96-243	Ind. Comm. (386276)	Affirmed

FILED 17 SEPTEMBER 1996

COMMUNITY SERVICE OF THE CAROLINA'S v. FREEMAN No. 95-1068	Forsyth (95CVS3197)	Affirmed
HAYES v. WRENN HANDLING, INC. No. 95-748	Forsyth (94CVS5300)	Affirmed
IN RE ESTATE OF STEWART No. 95-1142	Moore (91E298)	Affirmed
MAY v. XPERTEL, INC. No. 95-1029	New Hanover (93CVD3027)	Reversed and Remanded
MOSLEY v. TRW, INC. No. 95-93	Ind. Comm. (973125)	Affirmed
STATE v. CHISHOLM No. 96-374	Guilford (94CRS37992) (94CRS37993) (94CRS37994)	No Error

STATE v. HAMMOND No. 96-211	New Hanover (92CRS24937)	Affirmed
STATE v. HARRIS No. 96-345	Davidson (94CRS18412)	No Error
STATE v. JOHNSON No. 94-1401	Franklin (94CRS1122) (94CRS1123)	New Trial
STATE v. LEE No. 95-1258	Chatham (94CRS5220) (94CRS5474) (94CRS5898)	Vacated and Remanded for Resentencing
STATE v. LONG No. 95-1272	Wayne (94CRS7741)	No Error
STATE v. LOWERY No. 96-273	Mecklenburg (94CRS59641)	No Error
STATE v. MAGNUSON No. 96-408	Wake (93CRS43168)	No Error
STATE v. RICHARDSON No. 96-424	Forsyth (95CRS17916)	No Error
STATE v. SMITH No. 96-350	Forsyth (95CRS25322)	No Error
STATE v. SMITH No. 96-373	Wake (94CRS43926) (94CRS67611)	No Error
STATE v. SOUTHARD No. 96-32	Onslow (95CRS888) (95CRS891) (95CRS893)	No Error
STATE v. THOMPSON No. 95-1398	Durham (95CRS4107)	No Error
TOWN OF KILL DEVIL HILLS v. SMITH No. 95-435	Dare (94CVS151)	Reversed and Remanded
WALKER v. DURHAM BD. OF ED. No. 95-1207	Durham (95CVS02583)	Affirmed

APPENDIX

**ORDER ADOPTING AMENDMENT
TO GENERAL RULES OF PRACTICE
FOR THE
SUPERIOR AND DISTRICT COURTS**

**Order Adopting
Amendment to General Rules of
Practice for the Superior and District Courts**

Pursuant to authority of N.C.G.S. §7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of a new subsection (b) to Rule 5 and amendments to subsection (a) of Rule 5, to read as follows:

Rule 5. Form of Pleadings

(a) If feasible, each paper presented to the court for filing shall be flat and unfolded, without manuscript cover, and firmly bound.

All papers presented to the court for filing shall be letter size (8 1/2" x 11"), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size. This subsection of this rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

(b) All papers filed in civil actions, special proceedings and estates shall include as the first page of the filing a cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts. The Clerk of Superior Court shall require a party to refile any paper which does not include the required cover sheet. This subsection of this rule shall become effective on October 1, 1996. Prior to that date filings with and without cover sheets will be accepted.

Adopted by the Court in Conference this 5th day of September, 1996. The amendment shall be effective 1 October 1996, and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution by mail to each superior court judge in the State.

ORR, J.
For the Court

ANALYTICAL INDEX



WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ACCOUNTS	ILLEGITIMATE CHILDREN
ACCOUNTS AND ACCOUNTS STATED	INDICTMENT, INFORMATION, AND
ADMINISTRATIVE LAW AND PROCEDURE	CRIMINAL PLEADINGS
ADMIRALTY, NAVIGATION, AND BOATING	INSURANCE
ADVERSE POSSESSION	INTENTIONAL INFLICTION OF
APPEAL AND ERROR	MENTAL DISTRESS
ARBITRATION AND AWARD	INTEREST AND USURY
ARREST AND BAIL	
ATTORNEY GENERAL	JUDGMENTS
AUTOMOBILES AND OTHER VEHICLES	
	KIDNAPPING AND FELONIOUS RESTRAINT
BANKRUPTCY AND INSOLVENCY	
BANKS AND OTHER	LIMITATIONS, REPOSE, AND LACHES
FINANCIAL INSTITUTIONS	
BUILDING CODES AND REGULATIONS	MONOPOLIES AND RESTRAINTS
BURGLARY AND UNLAWFUL BREAKINGS	OF TRADE
	MORTGAGES AND DEEDS OF TRUST
CARRIERS	MUNICIPAL CORPORATIONS
CONSTITUTIONAL LAW	
CONTRACTS	NARCOTICS, CONTROLLED SUBSTANCES,
CORPORATIONS	AND PARAPHERNALIA
COSTS	NEGLIGENCE
COURTS	NEGOTIABLE INSTRUMENTS AND
CRIMINAL LAW	OTHER COMMERCIAL PAPER
DAMAGES	OBSCENITY, PORNOGRAPHY,
DISCOVERY AND DEPOSITIONS	INDECENCY, OR PROFANITY
DIVORCE AND SEPARATION	
	PARENT AND CHILD
EASEMENTS	PARTIES
ENVIRONMENTAL PROTECTION,	PLEADINGS
REGULATION, AND CONSERVATION	PRIVACY
EVIDENCE AND WITNESSES	PROCESS AND SERVICE
	PUBLIC OFFICERS AND EMPLOYEES
FORGERY	
FRAUD, DECEIT, AND MISREPRESENTATION	QUASI CONTRACTS AND RESTITUTION
HANDICAPPED, DISABLED, OR	RACKETEER INFLUENCED AND
AGED PERSONS	CORRUPT ORGANIZATIONS
HIGHWAYS, STREETS, AND ROADS	RETIREMENT
HOMICIDE	
HOUSING, AND HOUSING AUTHORITIES	SCHOOLS
AND PROJECTS	SEARCHES AND SEIZURES
HUSBAND AND WIFE	STATE

TAXATION

TORTS

TRESPASS

TRIAL

TRUSTS AND TRUSTEES

UNFAIR COMPETITION OR TRADE PRACTICES

UTILITIES

WORKERS' COMPENSATION

ZONING

ACCOUNTANTS

§ 21 (NCI4th). Negligence; liability to third party; necessity of reliance upon accountants' audit statement

The issue of whether plaintiff justifiably relied on unaudited financial statements prepared by defendant CPA firm should not have been dismissed. **Liberty Finance Co. v. BDO Seidman**, 515.

ACCOUNTS AND ACCOUNTS STATED

§ 14 (NCI4th). Parties liable on agreement or account

Defendant did not promise to pay the account debt of a customer to plaintiff supplier where defendant sent a letter to plaintiff stating that defendant had entered an agreement to provide financing and various advisory functions to the customer and that defendant planned to supply funding for the customer to bring its account current as quickly as possible. **Carolina Cable & Connector v. R&E Electronics, Inc.**, 519.

§ 14 (NCI4th). Parties liable on agreement or account

Summary judgment should have been granted for defendant in an action arising from the provision of pharmaceutical supplies where plaintiff had notice and was imputed with the knowledge of its agent that it could no longer charge pharmaceuticals to defendant's open account and, even if defendant did not give reasonable notice, plaintiff was notified through its agent that defendant had sold the pharmacy and had a duty to mitigate damages but continued to ship pharmaceuticals and charge the account. **J. M. Smith Corp. v. Matthews**, 771.

ADMINISTRATIVE LAW AND PROCEDURE

§ 54 (NCI4th). Judicial review; Administrative Procedure Act generally; jurisdiction

Neither the superior court nor the Court of Appeals had jurisdiction to review the Commission for Health Services' exercise of its rulemaking power with regard to anonymous HIV testing. **Act-Up Triangle v. Commission for Health Services**, 256.

§ 72 (NCI4th). Appeal from judgment on review generally

Respondent and intervenors had no right to appeal from the trial court's order remanding the action to an agency for a contested case hearing. **Byers v. N.C. Savings Institutions Division**, 689.

ADMIRALTY, NAVIGATION, AND BOATING

§ 39 (NCI4th). Operating boat while intoxicated

Operating a boat while intoxicated is a lesser included offense of involuntary manslaughter predicated upon that crime. **State v. Hudson**, 336.

Due process required the trial court to instruct on the lesser included offense of operating a boat while intoxicated as an alternative to the choices of either guilty or not guilty of involuntary manslaughter. **Ibid.**

ADVERSE POSSESSION**§ 31 (NCI4th). Tacking adverse successive possessions generally**

Where adverse possession originates in mistake but, upon discovery of the mistake by the adverse possessor, is perpetrated by conscious intent, the uninterrupted periods of adverse possession may be tacked together to satisfy the prescriptive period set out in G.S. 1-40. **Enzor v. Minton**, 268.

APPEAL AND ERROR**§ 7 (NCI4th). Sanctions for failure to comply with rules**

Defendants' appeal is dismissed where their contentions as to the competency of plaintiff's expert witness and his testimony were conclusory and not supported by objections in the record and the arguments in defendants' brief did not contain related assignments of error. **Setzer v. Boise Cascade Corp.**, 441.

§ 95 (NCI4th). Appealability of discovery orders; production of documents

The trial court's order requiring disclosure of documents relating to the assets, organization or business activities of defendant Prolife Action League was not immediately appealable. **Kaplan v. Prolife Action League of Greensboro**, 677.

§ 121 (NCI4th). Summary judgment orders; multiple claims or parties; appeal dismissed

Because the corporate employer's liability was derivative of a finding of liability against the employee's estate, there was no possibility of inconsistent verdicts, and plaintiff's appeal from summary judgment for defendant employer was dismissed as premature. **Long v. Giles**, 150.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

An assignment of error to the trial court's denial of defendant's request to voir dire a DNA expert as to testing procedures was not addressed on appeal where defendant made only a general objection at trial and the grounds were not apparent from the context. **State v. Hairston**, 753.

§ 182 (NCI4th). Effect of appeal on power of trial court; criminal actions generally

The trial court had no jurisdiction while defendant's case was on appeal to amend the original order arresting judgment or to amend the judgment and commitment from which he appealed. **State v. Davis**, 240.

§ 355 (NCI4th). Effect of omission of necessary part of record

The absence of a Form 21 agreement for compensation from the record on appeal subjected this appeal to dismissal. **Crouse v. Flowers Baking Co.**, 555.

§ 401 (NCI4th). Matters cognizable ex mero motu; defects in jurisdiction

Although the issue of standing to contest the Water Supply Watershed Protection Act as an unconstitutional delegation of legislative power was not presented, standing is a question of subject matter jurisdiction which may be raised on the Court's own motion. **Town of Spruce Pine v. Avery County**, 704.

ARBITRATION AND AWARD**§ 40 (NCI4th). Vacation of award**

The trial court erred in denying plaintiff contractor's Rule 59 motion to alter, amend, or open the judgment where the sole arbitrator did not disclose numerous social, business, and professional relationships with partners in the law firm representing defendant owner. **William C. Vick Construction Co. v. N.C. Farm Bureau Federation**, 97.

The trial court properly allowed plaintiff to depose the arbitrator where there was a basis for the court's belief that misconduct had occurred. **Ibid**.

ARREST AND BAIL**§ 142 (NCI4th). Pretrial release; defendants charged with noncapital offenses**

The trial court did not err by denying defendant's motion to dismiss charges against him based on the prosecutor's ex parte contact with the judge where defendant was arrested and charged with first-degree burglary, first-degree sexual offense and misdemeanor assault on a female; he was released the same day on a thousand dollar bond; the prosecutor submitted a bill of indictment which substituted assault with a deadly weapon inflicting serious injury for the misdemeanor assault charge; the prosecutor approached the senior resident superior court judge after the grand jury issued indictments to have bond set for the new felony charge; and the bond was set and defendant rearrested. **State v. Hunt**, 762.

ATTORNEY GENERAL**§ 11 (NCI4th). Actions and proceedings generally**

The Attorney General had no authority to file a Rule 60(b) motion to set aside a district court order dismissing plaintiff's URESA claim for child support arrearages. **Sotelo v. Drew**, 464.

AUTOMOBILES AND OTHER VEHICLES**§ 550 (NCI4th). Children darting into road; evidence insufficient to submit to jury**

The trial court properly directed verdict for defendant in an action to recover for injuries received by the seven-year-old plaintiff when he was struck by a vehicle driven by defendant where the evidence showed that plaintiff suddenly stepped out into defendant's path, defendant was not speeding, and defendant did not leave her proper lane of travel. **Manley v. Parker**, 540.

§ 766 (NCI4th). Instructions; sudden emergency brought about by own negligence

The trial court erred in instructing the jury on the sudden emergency doctrine where defendant's car hydroplaned when he applied brakes on a wet road, and he contributed to any emergency by failing to maintain a proper lookout or speed in light of the roadway conditions at that time. **Allen v. Efird**, 701.

§ 856 (NCI4th). Elements of leaving scene of accident and failure to report or render assistance

Plaintiff did not sufficiently forecast evidence of a violation of the hit-and-run statute where plaintiff failed to show that decedent would have been aided by the

AUTOMOBILES AND OTHER VEHICLES—Continued

driver's stopping at the scene and rendering the aid mandated by the statute. **Powell v. Doe**, 392.

§ 861 (NCI4th). Leaving scene of accident; sufficiency of evidence generally; evidence of defendant's knowledge

Plaintiff's claim for common law negligence and the violation of statutorily imposed duties of care failed where no evidence was forecast establishing any negligence whatsoever arising from the hit-and-run driver's role in the accident. **Powell v. Doe**, 392.

BANKRUPTCY AND INSOLVENCY

§ 12 (NCI4th). Debts and liens discharged

The trial court erred by failing to dismiss an equitable distribution claim where defendant had filed a petition for Chapter 7 bankruptcy which included all marital debts and listed plaintiff as a general unsecured creditor, plaintiff received timely notice of the bankruptcy proceeding and was represented by counsel, and plaintiff requested relief from the stay to protect his interest in the residence but made no objection to the discharge of marital debt. **Justice v. Justice**, 733.

BANKS AND OTHER FINANCIAL INSTITUTIONS

§ 59 (NCI4th). Loans generally

Defendant bank was entitled to a directed verdict as to plaintiffs' claim for negligence in failing to monitor the use of funds from a loan secured by a letter of credit given for the acquisition of a mutual fund. **Carlson v. Branch Banking and Trust Co.**, 306.

BUILDING CODES AND REGULATIONS

§ 46 (NCI4th). Inspections

The trial court properly dismissed plaintiffs' action against defendant county and defendant county building inspector based upon negligence in the inspection of their residence during construction where plaintiffs did not show that a special relationship or a special duty was created between defendants and plaintiffs. **Moseley v. L & L Construction, Inc.**, 97.

BURGLARY AND UNLAWFUL BREAKINGS

§ 57 (NCI4th). Sufficiency of evidence; first-degree burglary

The trial court did not err by denying defendant's motion to dismiss charges of first-degree burglary and felonious larceny. **State v. Myers**, 189.

CARRIERS

§ 92 (NCI4th). Operations of carriers; duty of care, generally

The trial court erred in granting summary judgment for plaintiff in an action against a common carrier-lessee to recover for injuries received in a collision with the owner-lessor of a tractor where the owner deviated from the lease agreement with defendant carrier and was acting outside the scope of his employment when the accident occurred. **Parker v. Erixon**, 383.

CONSTITUTIONAL LAW

§ 32 (NCI4th). Prohibition against delegation of lawmaking power

Summary judgment should have been granted for the County on its cross-claim against the State agencies for a declaratory judgment that the Water Supply Watershed Protection Act is an unconstitutional delegation of legislative power in that it lacks meaningful guiding standards because it contains no findings and conclusions and fails to give any meaningful guidance as to how it should be implemented. Procedural safeguards alone are not enough. **Town of Spruce Pine v. Avery County**, 704.

§ 49 (NCI4th). Standing to challenge constitutionality of statutes generally; requirement of direct injury

The County had standing to contest the constitutionality of the Water Supply Watershed Protection Act as an unconstitutional delegation of legislative power. **Town of Spruce Pine v. Avery County**, 704.

§ 107 (NCI4th). Notice and hearing under statutes affecting due process rights

Defendants stated a claim under 42 U.S.C. § 1983 for deprivation of due process based on plaintiff county's action in adding attorney's fees to tax liens without notice or hearing. **Onslow County v. Phillips**, 317.

Plaintiff county was not entitled to summary judgment on defendants' claim for violation of their due process rights by the addition of attorney's fees to tax liens without notice or hearing. **Ibid**.

CONTRACTS

§ 106 (NCI4th). Novation and substitution generally

Plaintiff was entitled to recover the accelerated balance due on a promissory note executed in the sale of insurance business where defendant, upon discovering that the commissions it earned were less than those projected, unilaterally ceased making payments on the note rather than exercising its right under a commission warranty to have a new note substituted for the original note in an adjusted amount. **Stanley & Associates v. Risk and Ins. Brokerage Corp.**, 532.

CORPORATIONS

§ 137 (NCI4th). Voting generally

Where articles of incorporation authorized only one class of stock, provisions of the articles purporting to condition each shareholder's right to vote upon the payment of annual dues were void. **Byrd v. Raleigh Golf Assn.**, 272.

COSTS

§ 37 (NCI4th). Attorneys' fees; other particular actions or proceedings

The Uniform Arbitration Act does not forbid an award of fees for services provided by an attorney before the case is referred to binding arbitration. **Lucas v. City of Charlotte**, 140.

COURTS

§ 145 (NCI4th). Effect of contract provisions specifying applicable law

The resolution of issues involving an open account for pharmaceutical supplies was controlled by North Carolina law. **J. M. Smith Corp. v. Matthews**, 771.

CRIMINAL LAW

§ 113 (NCI4th). Discovery proceedings; failure to comply

The trial court did not abuse its discretion in permitting the State to elicit testimony with regard to allegedly forged checks which the State failed to produce prior to trial pursuant to defendant's discovery request. **State v. Sisk**, 361.

§ 314 (NCI4th). Joinder of charges against multiple defendants generally

The trial court did not err in allowing the State's motion to join both defendants for trial where statements by one defendant about the circumstances surrounding the attempted theft of a car were admissible against the other defendant. **State v. Weaver**, 276.

§ 547 (NCI4th). Mistrial; jury argument outside of evidence

The trial court did not err in failing to declare a mistrial in a prosecution for uttering a forged check when the prosecutor, during closing arguments, mentioned two checks that were not admitted into evidence. **State v. Sisk**, 361.

§ 771 (NCI4th). Properly refused instructions on insanity

The trial court did not err in a prosecution for first-degree burglary and felonious larceny by refusing to submit defendant's requested instruction on the defense of insanity. **State v. Myers**, 189.

§ 793 (NCI4th). Instruction as to "acting in concert" generally

The trial court erred in its instructions on acting in concert where the instructions allowed the jury to convict defendant of specific intent crimes without requiring the State to establish that defendant had the specific intent to commit those crimes. **State v. Weaver**, 276.

One defendant was prejudiced by erroneous instructions on acting in concert as to charges of armed robbery, felonious breaking or entering, and conspiracy, but a second defendant was not prejudiced by the erroneous instructions where the evidence showed that he was an active participant in every step of planning the crimes. **Ibid**.

§ 980 (NCI4th). Effect of arrest of judgment

Where the judgment was arrested because of a misstatement of the trial judge and there is no impediment to the entry of a lawful judgment, the guilty verdicts remain on the docket and judgment on those convictions may be entered upon remand. **State v. Davis**, 240.

§ 1073.8 (NCI4th). Structured sentencing; prior record level

The trial court may use one conviction obtained in a single calendar week to establish habitual felon status and another separate conviction obtained the same week to determine prior record level. **State v. Truesdale**, 639.

§ 1086 (NCI4th). Required findings where two or more convictions were consolidated for hearing or judgment

The trial court did not err when sentencing defendant for first-degree burglary and felonious larceny by failing to find factors in aggravation or mitigation for both

CRIMINAL LAW—Continued

offenses and then sentencing him to a term in excess of the presumptive. **State v. Myers**, 189.

§ 1097 (NCI4th). Consideration of aggravating and mitigating factors generally; discretion of trial court

The trial court did not err in sentencing defendant where defendant contended that his sentence was disproportionate in relation to those most defendants receive for the same or similar offenses where the trial court found no factors in mitigation and found as an aggravating factor that defendant had a prior conviction or convictions punishable by more than sixty days' confinement. **State v. Hairston**, 753.

§ 1110 (NCI4th). Fair Sentencing Act; nonstatutory aggravating factors; prior criminal activity

There was no error in considering a 1987 habitual felony adjudication as a nonstatutory aggravating factor for defendant's present sentence as long as the underlying felonies were not also considered as aggravating factors. **State v. Kirkpatrick**, 86.

§ 1284 (NCI4th). Ancillary nature of habitual felon indictment

The trial court erred by sentencing defendant as an habitual felon after having arrested judgment in all the underlying felonies for which defendant was convicted. **State v. Davis**, 240.

§ 1286 (NCI4th). Repeat or habitual offender; evidence of prior convictions of felony offenses

Where defendant was convicted of habitual impaired driving and then adjudicated an habitual felon, and the record did not show that his prior record level was established by using convictions necessary to adjudge him an habitual felon, there was no violation of the provisions of G.S. 14-17.6 which prohibit a defendant's felony sentence from being enhanced as an habitual felon when elements necessary to prove that he is a habitual felon are the same as those elements which were used to support the underlying felony for which defendant is being sentenced. **State v. Misenheimer**, 156.

Where defendant had been previously convicted as an habitual felon, a second conviction as an habitual felon based partially upon the same predicate offenses did not constitute double jeopardy. **State v. Creason**, 495.

When appealing the use of a prior conviction as a partial basis for an habitual felon indictment, questioning the validity of the original conviction is an impermissible collateral attack. **Ibid**.

The trial court may use one conviction obtained in a single calendar week to establish habitual felon status and another separate conviction obtained the same week to determine prior record level. **State v. Truesdale**, 639.

DAMAGES

§ 173 (NCI4th). Lost earnings and profits

The trial court did not err by refusing to instruct the jury that it could not measure any wage loss plaintiff truck driver may have suffered during the time his license was suspended for one year where plaintiff did not claim loss of income for this time period as part of his damages. **Conner v. Continental Industrial Chemicals**, 70.

The trial court did not err by refusing to instruct the jury that a person who is capable of working but does not do so may not recover for the loss of any amount he

DAMAGES—Continued

was capable of earning where plaintiff sought employment after his injury and an instruction on reduced capacity to earn gave the substance of this instruction. **Ibid.**

§ 178 (NCI4th). Verdict generally; excessive or inadequate award

The jury's award of one dollar in damages to plaintiff upon finding negligence by defendant in a rear-end collision will not be set aside on the ground it was against the greater weight of the evidence on the issue of whether the accident aggravated plaintiff's preexisting degenerative disk disease where evidence on this issue presented a question of fact for the jury, but the award must be set aside where it was undisputed that defendant's negligence caused plaintiff to suffer an acute cervical sprain, and the award was less than the amount of expenses plaintiff proved she incurred for treatment of her cervical sprain. **Anderson v. Hollifield**, 426.

DISCOVERY AND DEPOSITIONS**§ 68 (NCI4th). Enforcing discovery; sanctions; dismissal or default judgment**

Where joint liability was alleged, the trial court should have adjudicated the nondefaulting female defendant's liability before determining whether to enter a default judgment as a sanction against the defaulting male defendant. **Moore v. Sullivan**, 647.

DIVORCE AND SEPARATION**§ 4 (NCI4th). Separation agreements; writing and acknowledgement**

A trial court order holding that earlier oral stipulations as to marital and property rights were binding was vacated and remanded where there was no evidence in the record that the stipulation was ever reduced to writing and thereafter duly executed and acknowledged, the trial court made no contemporaneous inquiry of the parties, and the parties were absent from the courtroom at the time the oral stipulation was stated on the record. **Hurley v. Hurley**, 781.

§ 36 (NCI4th). Separation agreements; what constitutes a resumption of marital relations

The trial court erred by ordering rescission of the parties' separation agreement where plaintiff left the marital home and moved into a mobile home which she maintained as a separate residence; the parties entered into a separation agreement; plaintiff returned to the marital home for six days, taking with her one work outfit and toiletry items such as make-up and a toothbrush; the parties spent the evenings together, dining and spending time with their sons; plaintiff returned to her trailer on one occasion for more clothes; plaintiff and defendant engaged in sexual intercourse several times; and defendant ask plaintiff to leave, stating that he wanted to be with his girlfriend. **Fletcher v. Fletcher**, 744.

§ 42 (NCI4th). Separation agreements; breach of agreement as defense to enforcement

The trial court erred by ordering rescission of a separation agreement on the basis of defendant's marital breaches where defendant's breaches were not material in that they neither substantially defeated the purpose of the agreement nor went to the very heart of the agreement. **Fletcher v. Fletcher**, 744.

DIVORCE AND SEPARATION—Continued

§ 340 (NCI4th). Contents of custody order

The trial court did not abuse its discretion in granting defendant father charge of the minor child's religious training and practice and requiring plaintiff mother's cooperation with respect thereto. **MacLagan v. Klein**, 557.

§ 359 (NCI4th). Modification of custody order generally

It is not required that the person having custody under a previous order be found unfit or no longer able or suited to retain custody in order to modify the custody order. **MacLagan v. Klein**, 557.

§ 372 (NCI4th). Miscellaneous circumstances warranting modification of custody order

Stress and anxiety suffered by a child as a result of her exposure to the parties' competing religions constituted a substantial change in circumstances affecting the health and welfare of the child. **MacLagan v. Klein**, 557.

The trial court's findings with respect to changes which occurred since plaintiff mother and the child moved from Chapel Hill to Edenton were based on competent evidence and were sufficient to support the court's conclusion of a substantial change in circumstances. **Ibid**.

The trial court made sufficient findings to support its conclusion that circumstances had substantially changed since the previous custody order which affected the health and welfare of the child so that a modification of the prior order would be in her best interest. **Ibid**.

§ 494 (NCI4th). Uniform Child Custody Jurisdiction Act; North Carolina is child's home state

Where one of the parties' children was born in North Carolina and resided here with his mother, North Carolina was the child's "home state," Kentucky thus did not have jurisdiction to enter the initial custody decree with respect to that child, and the parties were not bound by the Kentucky order. **Beck v. Beck**, 629.

§ 513 (NCI4th). Modification of foreign order generally

The trial court properly declined to assume jurisdiction to adjudicate custody issues regarding a child for whom Kentucky was the "home state" where Kentucky assumed jurisdiction when it entered its initial order and had continuing jurisdiction, since North Carolina could not modify the Kentucky order as long as plaintiff father continued to reside there or unless Kentucky declined to exercise its jurisdiction. **Beck v. Beck**, 629.

§ 563 (NCI4th). Enforcement of foreign child support orders generally

Since the New Jersey court which entered the original child support order lost continuing, exclusive jurisdiction pursuant to the Full Faith and Credit for Child Support Orders Act, the trial court properly modified the order pursuant to G.S. 50-13.7 by determining that the automatic escalation clause in the order was void under North Carolina law. **Kelly v. Otte**, 585.

§ 566 (NCI4th). Registration of foreign support order

The trial court did not err in determining that the statute of limitations barred the collection of child support arrears which accrued more than ten years preceding the filing of the Notice of Registration even though defendant failed to plead the statute of limitations prior to confirmation of the foreign support order where de-

DIVORCE AND SEPARATION—Continued

fendant alleged severe financial problems at the time his payments were due. **Kelly v. Otte**, 585.

§ 567 (NCI4th). Uniform Reciprocal Enforcement of Support Act; enforcement of foreign support order

The Attorney General had no authority to file a Rule 60(b) motion to set aside a district court order dismissing plaintiff's URESA claim for child support arrearages. **Sotelo v. Drew**, 464.

Although the trial court's finding and conclusion that a foreign child support order was to be treated as an order by the State of North Carolina upon its registration violated the Full Faith and Credit for Child Support Orders Act, this finding and conclusion constituted harmless error where the court recognized that the Act required application of New Jersey law in interpreting the order. **Kelly v. Otte**, 585.

EASEMENTS

§ 32 (NCI4th). Creation by prescription; effect of permissive use

There was insufficient evidence of adverse use to support a jury verdict finding a prescriptive easement where plaintiffs failed to rebut the presumption that their use was permissive. **Booger v. Gatton**, 635.

§ 37 (NCI4th). Creation by prescription; substantial identity

Plaintiffs' evidence of substantial identity was insufficient to support a jury verdict finding a prescriptive easement. **Boger v. Gatton**, 635.

**ENVIRONMENTAL PROTECTION,
REGULATION, AND CONSERVATION**

§ 124 (NCI4th). Sedimentation; violations of law; enforcement; remedies

The N.C. Administrative Code provided the procedure for sending a notice of violation of the Sedimentation Pollution Control Act, and respondent agency adequately followed that procedure where an officer of petitioner corporation signed the certified mail return receipt for the notice of violation which respondent mailed to petitioner. **Midway Grading Co. v. N.C. Dept. of E.H.N.R.**, 501.

The trial court erred in concluding that petitioner was not required to file a soil erosion and sedimentation plan because petitioner did not own more than one acre of land on which land disturbing activity was being conducted where petitioner's actions caused more than one acre of land to be uncovered. **Ibid**.

EVIDENCE AND WITNESSES

§ 148 (NCI4th). Existence of insurance; liability insurance

G.S. 97-10.2(e) provides for the introduction of evidence of workers' compensation benefits received but provides no corresponding right to plaintiff to introduce evidence of defendant's liability insurance coverage. **Anderson v. Hollifield**, 426.

§ 254 (NCI4th). Collateral source rule; workers' compensation

G.S. 97-10.2(e) provides for the introduction of evidence of workers' compensation benefits received but provides no corresponding right to plaintiff to introduce evidence of defendant's liability insurance coverage. **Anderson v. Hollifield**, 426.

EVIDENCE AND WITNESSES—Continued**§ 330 (NCI4th). Other crimes, wrongs, or acts; admissibility to show knowledge; fraud; forgery**

Allegedly forged checks drawn on the victim's account but which were not referenced in the indictment for uttering were admissible to show knowledge by defendant. **State v. Sisk**, 361.

§ 627 (NCI4th). Motions to suppress; appeal; motion to suppress denied

Because defendant failed to file an affidavit to support his motion to suppress, he waived his right to seek suppression of evidence seized from his apartment on constitutional grounds. **State v. Creason**, 495.

§ 672 (NCI4th). Introduction of like evidence without objection as waiver

The North Carolina Property Tax Commission did not err in receiving additional evidence of the value of contaminated property where the county initially objected, then elected to offer its own additional evidence. **In re Appeal of Camel City Laundry Co.**, 210.

§ 785 (NCI4th). Exclusion of evidence; cure of prejudicial error by admission of other evidence; testimony as to intent or motive

Any error in the exclusion of defendant's testimony regarding statements made by a fellow employee to defendant which would negate defendant's knowledge that the endorsement on a check which he tried to cash was forged was not prejudicial where defendant was allowed to present substantially the same evidence as that excluded by the court. **State v. Kirkpatrick**, 86.

Defendant was not prejudiced by the exclusion of examination of a minor child's therapist with respect to a conference in which plaintiff mother allegedly made statements regarding her motives in moving from Chapel Hill where evidence of similar import was before the court. **MacLagan v. Klein**, 557.

§ 967 (NCI4th). Records of regularly conducted activity generally

Though the trial court erred by admitting under the business records exception to the hearsay rule the affidavits of a bank account owner that several checks were neither signed nor otherwise authorized by him, such error was not prejudicial to defendant. **State v. Sisk**, 361.

§ 1457 (NCI4th). Sufficiency of establishment of chain of custody; blood samples

The trial court did not err by admitting into evidence in a prosecution for armed robbery, burglary and rape defendant's blood sample where defendant contended that the State did not adequately establish the chain of custody due to insufficient evidence of who actually drew the blood. **State v. Hairston**, 753.

§ 1946 (NCI4th). Business entries, records, and reports generally

Defendants' stipulation that a report of defendant employee's post-accident drug test was an authentic business record made in the ordinary course of business precluded defendants from complaining on appeal that plaintiff did not lay a proper foundation and that the report was hearsay. **Conner v. Continental Industrial Chemicals**, 70.

§ 2209 (NCI4th). Particular subjects of expert testimony; blood; grouping and typing

The trial court did not err in a prosecution for armed robbery, burglary and rape by finding that a witness was an expert in forensic serology. **State v. Hairston**, 753.

EVIDENCE AND WITNESSES—Continued**§ 2211 (NCI4th). Particular subjects of expert testimony; DNA analysis**

The trial court did not err in a prosecution for armed robbery, burglary and rape by qualifying a witness as an expert in forensic DNA analysis. **State v. Hairston**, 753.

§ 2217 (NCI4th). Expert testimony; drugs; qualification of particular witnesses to analyze

Evidence in the record supports the trial court's qualification of a doctor to give expert testimony that defendant employee was impaired by cocaine at the time of an accident. **Conner v. Continental Industrial Chemicals**, 70.

§ 2301 (NCI4th). Expert testimony; formation of criminal intent; opinion as conclusion on ultimate issue to be determined

The trial court did not err in a prosecution for first-degree burglary and felonious larceny by sustaining the State's objection to defendant's offer of testimony from substance abuse counselor and clinical social worker that defendant was laboring under such a defect of reason that he was incapable of knowing the nature and quality of his acts or of distinguishing between right and wrong. **State v. Myers**, 189.

§ 2647 (NCI4th). Privileged communications; medical records contain protected information

The trial court did not err by refusing to require disclosure to defendant of the psychiatric records of a State's witness. **State v. Sisk**, 361.

§ 2937 (NCI4th). Basis for impeachment; antisocial conduct

The trial court did not abuse its discretion in a prosecution for first-degree burglary and felonious larceny by overruling defense objections to a line of questioning regarding conduct while defendant was in custody awaiting trial. **State v. Myer**, 189.

§ 3004 (NCI4th). Impeachment; time of conviction; determination of probative value

The issue of whether the trial court erred by denying defendant's motion in limine to prohibit the State from cross-examining him about a fourteen-year-old Florida conviction was not preserved for appellate review where defendant did not testify. **State v. Hunt**, 762.

FORGERY**§ 19 (NCI4th). Indictment; variance**

There was no fatal variance between an indictment for uttering a forged check and the evidence where the body of the indictment identified defendant as the named payee of the forged document before mistakenly referring to him by an incorrect name, and the indictment named an incorrect bank; alterations allowed by the trial court to make the indictment conform to the evidence did not alter the charge substantially and thus did not constitute an impermissible amendment. **State v. Sisk**, 361.

§ 28 (NCI4th). Sufficiency of evidence; uttering a forgery

The evidence was sufficient for the jury in a prosecution for uttering a forged check with the intent to defraud. **State v. Sisk**, 361.

FRAUD, DECEIT, AND MISREPRESENTATION**§ 38 (NCI4th). Trial; summary judgment; jury questions**

The trial court did not err in directing verdicts in favor of defendant bank on plaintiffs' claims for fraud where there was no evidence that defendant made any representations to plaintiffs with respect to the transaction in question. **Carlson v. Branch Banking and Trust Co.**, 306.

HANDICAPPED, DISABLED, OR AGED PERSONS**§ 29 (NCI4th). Discriminatory practices in employment**

The trial court did not err by refusing to instruct that the jury should be aware that employers cannot discriminate against persons with disabilities where nothing in the record indicated that plaintiff had ever been denied employment because of his disability. **Conner v. Continental Industrial Chemicals**, 70.

HIGHWAYS, STREETS, AND ROADS**§ 31 (NCI4th). Outdoor advertising generally**

The Department of Transportation had the authority to regulate all nonconforming billboards in noncommercial/nonindustrial areas, including those erected prior to the enactment of the Outdoor Advertising Control Act. **Outdoor East v. Harrelson**, 685.

§ 54 (NCI4th). Municipalities; duty to maintain, generally

An abutting property owner had no city code or common law duty to repair a sidewalk which was part of its driveway and was thus not liable for injuries sustained by plaintiff pedestrian when she fell upon a depressed area of the sidewalk. **Williams v. City of Durham**, 595.

HOMICIDE**§ 225 (NCI4th). Identity of defendant as perpetrator; circumstantial evidence**

The evidence in a second-degree murder prosecution was insufficient to show that defendant was the perpetrator of the crime charged. **State v. Davidson**, 326.

§ 550 (NCI4th). Instructions; lesser included offenses generally

Due process required the trial court to instruct on the lesser included offense of operating a boat while intoxicated as an alternative to the choices of either guilty or not guilty of involuntary manslaughter. **State v. Hudson**, 336.

HOUSING, AND HOUSING AUTHORITIES AND PROJECTS**§ 23 (NCI4th). Rental of dwellings**

Defendant's son was not a guest of defendant in public housing, and defendant was improperly ordered to vacate the premises on the ground that her son had engaged in criminal activity while he was defendant's guest. **Charlotte Housing Authority v. Fleming**, 511.

§ 52 (NCI4th). The Unit Ownership Act generally

The Unit Ownership Act applied so that only the board of directors or the manager, not the homeowners association, could bring this action on behalf of the aggrieved property owners. **Richland Run Homeowners Assn. v. CHC Durham Corp.**, 345.

HUSBAND AND WIFE

§ 46 (NCI4th). Abandonment and nonsupport; sufficiency of evidence

The evidence was sufficient to support defendant's conviction of abandonment by a supporting spouse based on events which occurred before the wife sought a domestic violence order which required defendant to stay away from the marital residence for one year. **State v. Talbot**, 698.

ILLEGITIMATE CHILDREN

§ 7 (NCI4th). Civil action to establish paternity; standard of proof; blood grouping test

The trial court did not err in ordering defendant to submit to a blood grouping test where defendant admitted he had sexual relations with the mother of a child at the approximate time of conception, and unchallenged blood evidence showed that the mother's husband was not the father of the child. **Guilford County ex rel. Gardner v. Davis**, 527.

§ 55 (NCI4th). Effects of legitimation; property rights

Petitioner did not constructively comply with the statutory requirements which allow a father to inherit from an illegitimate child through intestate succession by executing an affidavit of paternity under G.S. 130A-101(f). **In re Estate of Morris**, 264.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 55 (NCI4th). Variance between pleadings and proof; ownership

There was no fatal variance between the indictment and proof where defendant was charged with attempted larceny of a car from "Finch-Wood-Chevrolet-Geo, Inc." and the evidence showed that Finch-Wood Chevrolet had custody of the car, but the evidence did not show that Finch-Wood was incorporated or that Finch-Wood Chevrolet was also known as Finch-Wood Chevrolet-Geo. **State v. Weaver**, 276.

INSURANCE

§ 8 (NCI4th). Remedies for unfair fixing of rates

The trial court did not err in dismissing a claim for relief that workers' compensation insurers and their rate bureau had illegally fixed rates. **N.C. Steel v. National Council on Compensation Ins.**, 163.

The filed rate doctrine does not preclude recovery on a claim that an illegal agreement between the defendants set an artificially high serving fee to workers' compensation carriers which forced employers into the residual market where they must pay surcharges and lose opportunities for discounts and dividends. **Ibid.**

§ 99 (NCI4th). Insurance policies and contracts; what law governs generally

A fleet insurance policy applied for, issued, and delivered by defendant to plaintiff's employer in Kansas was governed by North Carolina law under our "close connections" rule where defendant insured 1,479 of the employer's vehicles registered and used in this state. **Martin v. Continental Ins. Co.**, 650.

INSURANCE—Continued

§ 425 (NCI4th). Automobile personal injury policy; particular vehicles covered generally

An automobile policy issued to defendant's wife did not provide liability coverage for defendant while he was driving a truck owned by him but not listed in the declarations portion of the policy. **Owens v. Chance**, 523.

§ 435 (NCI4th). Automobile policies; application of exclusion for injuries sustained when person struck by vehicle owned by family member

Where a person is injured through the negligence of an insured family member while riding with that family member in an insured vehicle, North Carolina's Financial Responsibility Act prevents the operation of a family member exclusion in the policy's liability section to bar coverage, and the conformity provisions of a Florida automobile policy required defendant insurer to adjust the limits of its Florida policy to provide such coverage to plaintiff's decedent as required by North Carolina. **Cartner v. Nationwide Mutual Fire Ins. Co.**, 251.

§ 510 (NCI4th). Rejection of uninsured motorist coverage

Defendant insurer was required to utilize the UIM rejection form promulgated by the Rate Bureau to effect a rejection of UM/UIM coverage even though the policy at issue was a fleet policy beyond the jurisdiction of the Rate Bureau. **Martin v. Continental Ins. Co.**, 650.

§ 527 (NCI4th). Underinsured coverage generally

Defendant driver was neither a class one nor a class two insured entitled to UIM coverage under an auto policy naming defendant's father-in-law as the named insured and defendant's wife as a "listed driver" where defendant was occupying an automobile owned by his father at the time of the accident. **Nationwide Mutual Ins. Co. v. Williams**, 103.

The trial court erred in ordering rescission of an automobile policy in toto based upon the jury's finding of fraud by the insureds because the minimum liability coverage mandated by the Financial Responsibility Act becomes "absolute" upon the occurrence of injury or damage, but the successful defense of fraud insulated plaintiff insurer against a claim for UIM coverage. **Hartford Underwriters Ins. Co. v. Becks**, 489.

§ 528 (NCI4th). Extent of underinsured coverage

A motorcycle owned and operated by plaintiff in the course of his employer's business at the time of a collision was an "insured vehicle" under the terms of the employer's policy, and plaintiff, a class two insured, was a "person insured" for UIM purposes. **Vasseur v. St. Paul Mutual Ins. Co.**, 418.

§ 530 (NCI4th). Underinsured coverage; reduction of insurer's liability

An employer who has paid workers' compensation benefits to its employee is entitled to a lien on UIM benefits received by the employee in an action against the tortfeasor, and it is unimportant whether the policy is purchased by the employee or by his spouse residing in the same household. **Creed v. R. G. Swaim and Son, Inc.**, 124.

INSURANCE—Continued

§ 533 (NCI4th). **Effect of policy provisions being in conflict with underinsured motorist statutes; where policy fails to provide underinsured coverage**

Where plaintiff's employer executed no rejection of UIM coverage for "nonowned autos" in accordance with G.S. 20-279.21(b)(4), plaintiff's employer's policy provided UIM coverage for such autos. **Vasseur v. St. Paul Mutual Ins. Co.**, 418.

§ 535 (NCI4th). **Underinsured coverage; effect of insurer waiving rights of subrogation**

A UIM carrier waived its subrogation rights under G.S. 20-279.21(b)(4) by failing to advance the amount tendered by the tortfeasors' liability carrier within 30 days of the UIM carrier's receipt of a letter from the liability carrier advising that it was tendering its policy limits. **Daughtry v. Castleberry**, 671.

§ 815 (NCI4th). **Fire and homeowners insurance; arbitration and appraisal; validity of award**

In a dispute over the actual cash value for insurance purposes of sweet potatoes destroyed by fire, the trial court was not required to instruct the umpire and appraisers on the proper method for determining the actual cash value of the crop, but the trial court erred by incorporating in its judgment an appraisal report signed only by the umpire. **Enzor v. N.C. Farm Bureau Mut. Ins. Co.**, 544.

§ 822 (NCI4th). **Fire and homeowners insurance; provisions excluding liability; loss arising out of ownership or maintenance of motor vehicle**

Plaintiff's homeowners liability policy excluded coverage for liability for wrongful death where a livestock trailer towed by defendant's truck became disconnected and struck an oncoming car, resulting in the driver's death. **Nationwide Mutual Ins. Co. v. Integon Indemnity Corp.**, 536.

§ 1135 (NCI4th). **Sufficiency of evidence; actions against insurer for negligence or bad faith in settlement**

The trial court erred by granting summary judgment on the issue of unfair trade practices for defendant Nationwide in an action arising from a car wreck where plaintiff obtained a judgment for damages which included prejudgment interest and eventually filed this action which included claims for breach of contract to pay an insurance claim and unfair and deceptive trade practices. **Murray v. Nationwide Mutual Ins. Co.**, 1.

Summary judgment was reversed as to State Farm and U.S. Liability for unfair and deceptive trade practices in an action which arose from an unpaid judgment arising from an automobile accident; the fact that defendants paid their share of this interest and unpaid costs prior to judgment does not negate the possible existence of damages. **Ibid.**

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 2 (NCI4th). **Sufficiency of claim**

The trial court should have granted summary judgment against defendants on their claims for intentional and negligent infliction of emotional distress where defendant did not allege facts showing that the alleged distress was severe. **Onslow County v. Phillips**, 317.

INTENTIONAL INFLICTION OF MENTAL DISTRESS—Continued**§ 2 (NCI4th). Sufficiency of claim**

The trial court erred in entering summary judgment for defendants in an action for intentional infliction of emotional distress based on sexual comments and advances made toward plaintiff by a newspaper editor. **Denning-Boyles v. WCES, Inc.**, 409.

§ 3 (NCI4th). Directed verdict

The trial court erred in granting summary judgment for defendants on plaintiff's claim for intentional infliction of emotional distress based on defendants' conduct in breaking into plaintiff's house and installing a hidden video camera. **Miller v. Brooks**, 20.

INTEREST AND USURY**§ 13 (NCI4th). Interest in excess of legal maximum rate generally**

The trial court correctly concluded as a matter of law that plaintiff paid defendant \$1,700 in usurious interest during the two years preceding filing of the claim based on the calculations of plaintiff's expert financial consultant. **Britt v. Jones**, 108.

§ 20 (NCI4th). Recovery of double amount of usurious interest paid

Plaintiff was entitled to have the \$1,700 in usurious interest paid to defendant doubled pursuant to G.S. 24-2. **Britt v. Jones**, 108.

The trial court properly awarded plaintiff damages for both usury and unfair or deceptive practices. **Ibid.**

JUDGMENTS**§ 62 (NCI4th). Effect of ambiguity in judgment; inconsistent conclusions**

In an appeal from a summary judgment involving slow payment by insurance companies where the summary judgment was apparently inconsistent but it was evident that none of the parties found it so, the Court of Appeals followed the assignments of error and the issues briefed and argued by the parties. **Murray v. Nationwide Mutual Ins. Co.**, 1.

§ 157 (NCI4th). Judgment by default; effect of answer being filed; late answer

The trial court erred in entering a default judgment against defendants where their answer, though untimely filed, was filed before the trial court made an entry of default against them. **Moore v. Sullivan**, 647.

§ 208 (NCI4th). Collateral estoppel; distinguished from res judicata

Collateral estoppel rather than res judicata was properly applied in this case, but collateral estoppel was not a bar to the current action to establish parentage of a child where parentage was not litigated in a prior divorce action, and the paragraph in the divorce judgment identifying plaintiff's husband as the father of the child was based upon the presumption of paternity raised by the child's birth during wedlock. **Guilford County ex rel. Gardner v. Davis**, 527.

KIDNAPPING AND FELONIOUS RESTRAINT**§ 18 (NCI4th). Confinement, restraint, or removal as inherent feature of another felony**

The trial court erred in failing to dismiss a charge of kidnapping against defendants where defendants moved the victim from a parking lot to her hotel room in order to effectuate a robbery because the victim's car keys and money were in the hotel room. **State v. Weaver**, 276.

LIMITATIONS, REPOSE, AND LACHES**§ 38 (NCI4th). Fraud, mistake, forgery, duress, or undue influence; actions involving deeds, generally**

The three-year statute of limitations for plaintiff's claim for rescission of a note and deed of trust for duress based on the allegation that they were improperly procured by the threat of criminal prosecution began to run on the date the note and deed of trust were signed where plaintiff had knowledge of the wrongfulness of the transaction on that date in that he had previously been advised by an attorney that the transaction was against public policy. **Hinson v. United Financial Services**, 469.

§ 152 (NCI4th). Mode or manner of raising defense of statute

Plaintiff's cause of action was insufficient as a matter of law where plaintiff failed to specially plead that its action was brought within the applicable statute of repose. **Richland Run Homeowners Assn. v. CHC Durham Corp.**, 345.

MONOPOLIES AND RESTRAINTS OF TRADE**§ 27 (NCI4th). Action by injured person; treble damages**

Indirect purchasers of infant formula had standing to sue for a violation of North Carolina's antitrust laws based on defendants' alleged conspiracy to fix the wholesale price of infant formula. **Hyde v. Abbott Laboratories**, 572.

MORTGAGES AND DEEDS OF TRUST**§ 46 (NCI4th). Effect of release of part of land from mortgage lien**

A purchaser who defaulted on payments under a promissory note secured by a purchase money deed of trust had a right to a release of a 28.68-acre tract from the deed of trust, even if it did not comply with the conditions precedent set forth in the release agreement, where the purchaser made principal payments sufficient for a release of this tract prior to its default. **In re Foreclosure of C and M Investments**, 52.

§ 51 (NCI4th). Particular acts constituting payment and satisfaction

A purchaser was required to make a principal payment due under a promissory note secured by a purchase money deed of trust even though the purchaser had a property release credit in excess of the principal payment then due. **In re Foreclosure of C and M Investments**, 52.

§ 61 (NCI4th). Nature of foreclosure under power of sale

Where defendants executed a promissory note and deed of trust with the understanding that photo processing equipment would be assigned to them, but authorization for the assignment was never obtained and defendants did not have possession of

MORTGAGES AND DEEDS OF TRUST—Continued

the equipment, a valid debt did not exist between the parties, and plaintiffs did not have a right to foreclosure under the power of sale. **In re Foreclosure of Aal-Anubiai-hotepokorohamz**, 133.

MUNICIPAL CORPORATIONS

§ 444 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance generally

Purchase of insurance by Residential Support Services did not constitute waiver of governmental immunity by defendant county. **Cross v. Residential Support Services**, 616.

§ 445 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance; extent of waiver

Plaintiffs' claims against a county health department for diminution in value of their subdivision were barred by sovereign immunity where the county's liability insurance, which was in excess of \$150,000, excluded coverage for damage to property, including diminution in value and loss of use. **Carter v. Stanly County**, 235.

§ 445 (NCI4th). Waiver of governmental immunity; liability insurance; extent of waiver

A county's participation in a local government risk pool operated as a total waiver of governmental immunity in regard to plaintiff's claim, and the trial court erred in ruling that the county had immunity for claims in the amount of \$1,000,000 or less. **Cross v. Residential Support Services**, 616.

§ 450 (NCI4th). Effect of duty being owed to general public rather than individual plaintiffs

The trial court properly dismissed plaintiffs' action against defendant county and defendant county building inspector based upon negligence in the inspection of their residence during construction where plaintiffs did not show that a special relationship or a special duty was created between defendants and plaintiffs. **Moseley v. L & L Construction, Inc.**, 79.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 207 (NCI4th). Double jeopardy; multiple convictions based on single quantity of controlled substance or single transaction generally

The trial court erred by dismissing charges arising from possession of two pounds of marijuana on double jeopardy grounds where defendant had paid a tax assessment under the North Carolina Controlled Substance Act. **State v. Ballenger**, 179.

Conviction of defendant on drug charges following the assessment of the controlled substance tax on the drugs in his possession at the time of the search of his residence did not constitute double jeopardy. **State v. Creason**, 495.

NEGLIGENCE

§ 33 (NCI4th). Sudden peril or emergency as affecting question of contributory negligence

The evidence was sufficient to support the trial court's instruction on sudden emergency in an action to recover for injuries sustained by plaintiff truck driver when he was struck by a forklift driven by a warehouse employee while unloading the truck. **Conner v. Continental Industrial Chemicals**, 70.

§ 150 (NCI4th). Premises liability; allegations of negligence involving sidewalks

An abutting property owner had no city code or common law duty to repair a sidewalk which was part of its driveway and was thus not liable for injuries sustained by plaintiff pedestrian when she fell upon a depressed area of the sidewalk. **Williams v. City of Durham**, 695.

§ 170 (NCI4th). Jury instructions; contributory negligence

The trial court did not err by refusing to give a contributory negligence instruction on the duty of plaintiff truck driver, who was struck by a forklift while his truck was being unloaded, to choose a safe way to do his job where the court instructed on the law of contributory negligence and on plaintiff's duty to keep a proper lookout. **Conner v. Continental Industrial Chemicals**, 70.

NEGOTIABLE INSTRUMENTS AND OTHER COMMERCIAL PAPER

§ 112 (NCI4th). Summary judgment

The trial court properly granted summary judgment for plaintiff in its action to recover the accelerated balance due on a promissory note executed in the sale of insurance business where defendant, upon discovering that the commissions it earned were less than those projected, unilaterally ceased making payments on the note rather than exercising its right under a commission warranty to have a new note substituted for the original note in an adjusted amount. **Stanley & Associates v. Risk and Ins. Brokerage Corp.**, 532.

OBSCENITY, PORNOGRAPHY, INDECENCY, OR PROFANITY

§ 13 (NCI4th). Sufficiency of evidence, generally

Evidence of what constituted "contemporary community standards" was unnecessary in this prosecution for disseminating obscene material. **State v. Johnston**, 292.

§ 14 (NCI4th). Intent and guilty knowledge

There was sufficient circumstantial evidence in this prosecution for dissemination of obscene material that defendant knew the character and content of the materials to be distributed. **State v. Johnston**, 292.

§ 16 (NCI4th). Instructions to jury generally

Defendant's right to a unanimous jury verdict in a prosecution for disseminating obscene magazines was not violated by the trial court's refusal to instruct the jury that there must be unanimous agreement that at least one of the two magazines purchased by a detective was obscene. **State v. Johnston**, 292.

OBSCENITY, PORNOGRAPHY, INDECENCY, OR PROFANITY—Continued**§ 18 (NCI4th). Instructions; definition of obscenity, generally**

The trial court's definition of a prurient interest in sex as "an unhealthy, abnormal, lascivious, shameful or morbid sexual interest" could not be understood by the jury to include a normal interest in sex and was appropriate, the court's instruction that the jury should apply the current standards in the community rather than the standards at the time of the incident was harmless error, and there was no error in the court's instruction that the jury could infer that defendant had knowledge of the nature and content of the magazines based on circumstantial evidence. **State v. Johnston**, 292.

PARENT AND CHILD**§ 96 (NCI4th). Termination of parental rights generally**

Parental rights could not be terminated by a unilateral declaration of termination filed by the parents. **In re Jurga**, 91.

§ 117 (NCI4th). Termination of parental rights; ineffective assistance of counsel

Respondent was not denied her right to effective assistance of counsel in a proceeding for termination of parental rights by failure of counsel to obtain a pretrial hearing, to move for dismissal at the end of DSS's evidence, and to object to certain testimony and exhibits. **In re Oghekevebe**, 434.

§ 126 (NCI4th). Termination of parental rights; disposition

The evidence supported the trial court's termination of respondent's parental rights where it showed that respondent left her minor child in foster care for over twelve months without showing reasonable progress or a positive response toward the diligent efforts of DSS. **In re Oghekevebe**, 434.

PARTIES**§ 12 (NCI4th). Real party in interest generally**

In an action to recover medical expenses incurred by plaintiff's son, the child is the real party in interest, and the claim must be asserted by a general or testamentary guardian or by a guardian ad litem. **Freeman v. Blue Cross and Blue Shield of North Carolina**, 260.

PLEADINGS**§ 15 (NCI4th). Stating demand for monetary relief**

A request for a statement of monetary relief sought is not a discovery document excluded from the filing requirement of Rule 5 and is therefore a paper that must be filed with the court either before service or within five days thereafter, and the trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought where no request was filed with the court. **Cottle v. Thompson**, 147.

§ 117 (NCI4th). Defense of failure to state claim; relationship to motion for summary judgment; conversion of motions

Although the parties purported to stipulate that the trial court could decide the case pursuant to Rule 12, the trial court explicitly acknowledged that it considered affidavits and the cases on appeal pursuant to summary judgment. **N.C. Steel v. National Council on Compensation Ins.**, 163.

PLEADINGS—Continued**§ 378 (NCI4th). Amended and supplemental pleadings relating to parties**

The trial court did not err in refusing to allow plaintiff to amend her complaint to add the individual owner of a newspaper, which had employed her, as a defendant. **Denning-Boyles v. WCES, Inc.**, 409.

§ 395 (NCI4th). Time for amendment and answer following amendment generally

The trial court did not abuse its discretion in denying plaintiff's motion to strike defendant's answer to plaintiff's amended complaint and its third-party complaint even though they were not timely filed. **Sykes v. Keiltex Industries, Inc.**, 482.

PRIVACY**§ 5 (NCI4th). Invasion of privacy based on intrusion on person's seclusion or into his private affairs**

Defendants' acts of installing a hidden video camera in plaintiff's bedroom and intercepting plaintiff's mail sustained claims for invasion of privacy by intrusion on plaintiff's seclusion, solitude, or private affairs. **Miller v. Brooks**, 20.

Plaintiff could properly seek punitive damages based on the intrusion tort upon proof of aggravated conduct based upon the fact defendants knew plaintiff had paranoid tendencies making him particularly susceptible to their intrusions into his house to install and check on a hidden video camera. **Ibid.**

PROCESS AND SERVICE**§ 35 (NCI4th). Service and filing of pleading and other papers generally**

A request for a statement of monetary relief sought is not a discovery document excluded from the filing requirement of Rule 5 and is therefore a paper that must be filed with the court either before service or within five days thereafter, and the trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought where no request was filed with the court. **Cottle v. Thompson**, 147.

PUBLIC OFFICERS AND EMPLOYEES**§ 42 (NCI4th). Employees subject to State personnel system**

Petitioner who shared a position and worked only six months out of the year was not a State "employee" under G.S. 135-1(10). **Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.**, 246.

QUASI CONTRACTS AND RESTITUTION**§ 13 (NCI4th). Effect of express contract generally; express contract precludes implied contract**

Plaintiff failed to state a claim for restitution based on unjust enrichment where he alleged that a note and deed of trust were procured by a threat of criminal prosecution because any such remedy would lie in contract law and not in equity. **Hinson v. United Financial Services**, 469.

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS**§ 7 (NCI4th). Private right of action**

Plaintiffs failed to proffer sufficient evidence to withstand defendants' motion for partial summary judgment where plaintiffs were a doctor and his family who brought an action under NC RICO against defendants arising from anti-abortion pickets. The plain language of the statute clearly indicates that the scope of NC RICO is limited to cases where pecuniary gain is derived from organized unlawful activity prohibited under the statute. Furthermore, it is apparent that the General Assembly did not intend to provide NC RICO with a broader remedial stroke than its federal counterpart and plaintiffs failed to demonstrate any injury or damage to property cognizable under RICO. **Kaplan v. Prolife Action League of Greensboro**, 720.

RETIREMENT**§ 6 (NCI4th). Teachers' and State Employees' Retirement Fund; claims for benefits**

The State was estopped from denying petitioner's retirement coverage for the contested period where petitioner worked only six months out of the year, the director of her agency represented that petitioner would continue to be a participating member of the Retirement System, and the Retirement System continued to send petitioner yearly statements indicating that she was a participating member of the Retirement System. **Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.**, 246.

§ 22 (NCI4th). Employee Retirement Income Security Act

Where it was impossible to determine from the pleadings whether a contract of insurance qualified under ERISA, the trial court erred in dismissing the complaint on the basis that plaintiff's claims are preempted by ERISA. **Freeman v. Blue Cross and Blue Shield of North Carolina**, 260.

Assuming the employer's group insurance policy was governed by ERISA, plaintiff employee's claim against the insurance company administering the policy for failure to pay her son's medical expenses was not required to be dismissed because plaintiff failed to allege that defendant did not have the discretion to deny the claim or that defendant abused its discretion in denying the claim. **Ibid.**

Extracontractual damages for pain and suffering and emotional distress and punitive damages are not remedies within the scope of ERISA. **Ibid.**

SCHOOLS**§ 154 (NCI4th). Grounds for dismissal or demotion of career teacher, generally**

G.S. 115C-325(e)(1)b implicitly requires the "immorality" of a career teacher to be in relation to, or to affect, that teacher's work before the teacher may be dismissed or demoted upon such ground. **Barringer v. Caldwell County Bd. of Educ.**, 373.

A career teacher was properly dismissed for immorality after pleading guilty to first-degree trespass based upon his approaching a crowded poolroom in the community armed with a loaded shotgun and a sidearm and proffering an explanation indicative of a violent intent. **Ibid.**

SEARCHES AND SEIZURES

§ 77 (NCI4th). **Investigatory stops of motor vehicles generally**

The trial court's findings did not support its conclusion that the highway patrol checking station where defendant was detained and checked for impaired driving was not conducted in accordance with required guidelines, and the court's order granting defendant's motion to suppress is reversed. **State v. Barnes**, 144.

§ 81 (NCI4th). **Lack of reasonable suspicion for stop and frisk**

The trial court erred in denying defendant's motion to suppress crack cocaine seized from his pocket at an airport during an investigatory stop and frisk where the officer had only a generalized suspicion of criminal activity. **State v. Artis**, 114.

STATE

§ 38 (NCI4th). **Industrial Commission as court for negligence claims against State**

A county health department director and registered sanitarians were agents of the State, and any action against them based on negligence must be filed in the Industrial Commission. **Carter v. Stanly County**, 235.

TAXATION

§ 79 (NCI4th). **Revaluation of real property**

The North Carolina Property Tax Commission properly concluded that a non-reappraisal year valuation was justified where the extent of subsurface soil and shallow groundwater contamination was not known on the date of the last regular appraisal. **In re Appeal of Camel City Laundry Co.**, 210.

§ 82 (NCI4th). **Valuation of real property generally**

The North Carolina Tax Commission acted within its authority in valuing property with contaminated subsurface soil and ground water at \$430,872 and this value was supported by competent, material and substantial evidence even though the property owner contended that the value was \$0.00. **In re Appeal of Camel City Laundry Co.**, 210.

§ 87 (NCI4th). **Valuation of real property; sufficiency of evidence**

Taxpayer appellees met their burden of showing that Wake County used an arbitrary method of valuation of their undeveloped property which substantially exceeded the true value in money of the property. **In re Appeal of Parsons**, 32.

§ 183 (NCI4th). **Costs; attorney's fees**

Plaintiff county did not have statutory authority to refuse to release the tax lien against defendants' property until attorney's fees were paid. **Onslow County v. Phillips**, 317.

§ 219 (NCI4th). **Injunctive relief to prevent collection of taxes**

Defendant landowners were not required to comply with the statute requiring payment of a tax as a prerequisite to filing their counterclaim where defendants attempted to tender the taxes due as stated in the foreclosure complaint but plaintiff county refused to accept their tender unless attorney's fees were paid. **Onslow County v. Phillips**, 317.

TORTS

§ 12 (NCI4th). Construction and interpretation of release from liability

A release executed by plaintiff and a representative for his employer and a supervisor of his employer as a result of mediation was a valid general release which released defendant, the manufacturer of a control system on machinery which malfunctioned and caused injury to plaintiff. **Sykes v. Keiltex Industries, Inc.**, 482.

§ 30 (NCI4th). Pleading release as defense

The trial court did not err in granting summary judgment for defendant based upon the affirmative defense of release because the court never granted defendant's motion to amend its answer to include the defense of release. **Sykes v. Keiltex Industries, Inc.**, 482.

TRESPASS

§ 46 (NCI4th). Sufficiency of evidence to support summary judgment

The trial court erred in granting summary judgment for defendants on plaintiff's trespass claim where there was evidence that defendants entered plaintiff's house several times in connection with a hidden video camera, and there were genuine issues of fact as to whether plaintiff's estranged wife had permission to enter her husband's house and to authorize others to do so and whether defendants' entries exceeded the scope of any permission given. **Miller v. Brooks**, 20.

§ 50 (NCI4th). Sufficiency of evidence to support award of damages

Plaintiff's forecast of evidence was sufficient to support his claim for damages to his real property incident to trespass from the installation of a hidden video camera in his house. **Miller v. Brooks**, 20.

TRIAL

§ 78 (NCI4th). Verified pleading as affidavit

Although defendant argued in an appeal from a summary judgment that plaintiff relied on the mere allegations of his pleadings, plaintiff properly verified his complaint and was entitled to have it considered as an affidavit. **Murray v. Nationwide Mutual Ins. Co.**, 1.

§ 213 (NCI4th). Dismissal without order of court generally

The one-year limitation period within which plaintiff could renew her claim under Rule 41(a)(1) commenced on the date plaintiff's counsel stated in open court that he intended to file notice of voluntary dismissal rather than when the written notice was filed five days later. **Baker v. Becan**, 551.

§ 227 (NCI4th). Voluntary dismissal as final termination of action; effect of orders subsequent to such dismissal

Defendants could not assert a claim for damages for wrongful claim and delivery in a motion after plaintiff, through counsel, had taken a voluntary dismissal pursuant to Rule 41(a). **Walker Frames v. Shively**, 643.

TRUSTS AND TRUSTEES

§ 129 (NCI4th). Validity of parol trust in favor of grantor of deed in fee simple

A parol trust in favor of the grantor plaintiffs could not be engrafted upon the written deeds conveying title to defendants in the absence of fraud, mistake, or undue influence. **Burton v. Burton**, 153.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 33 (NCI4th). Private action by person or entity injured by unfair competition

The filed rate doctrine is recognized and adopted in the context of a suit under G.S. 75-1 in which corporations which are or were required to provide workers' compensation insurance alleged that defendants undertook actions which violated G.S. 75-1 and resulted in higher premiums and other damages. **N.C. Steel v. National Council on Compensation Ins.**, 163.

§ 39 (NCI4th). Evidence that alleged act was unfair or deceptive

The trial court properly entered directed verdicts in favor of defendant bank on plaintiffs' claims for unfair and deceptive trade practices where defendant made no representations to anyone with respect to the intended purpose of a loan. **Carlson v. Branch Banking and Trust Co.**, 306.

§ 48 (NCI4th). Actual damages; measure of damages

The trial court properly awarded plaintiff damages for both usury and unfair or deceptive practices. **Britt v. Jones**, 108.

§ 51 (NCI4th). Attorney's fees to prevailing plaintiff or defendant generally

The trial court did not err in awarding plaintiff the entire amount of her requested attorney's fees pursuant to G.S. 75-16.1 for unfair or deceptive practices, even though plaintiff's counsel was a salaried employee of Legal Services of the Coastal Plains during a portion of the pendency of this action, where defendant willfully charged usurious rates of interest and made an unwarranted refusal to settle. **Britt v. Jones**, 108.

UTILITIES

§ 11 (NCI4th). Functions of Utilities Commission, generally; declaration of policy

The Utilities Commission did not exceed its statutory authority by the pronouncement of a policy in an adjudicative proceeding. **State ex rel. Utilities Comm. v. Public Staff**, 623.

§ 51 (NCI4th). Changes in relation to ownership or control of franchise

The Utilities Commission did not err in deciding that a public utility should retain 100% of the gain on the sale of two water systems instead of splitting the gain between its shareholder and its customers. **State ex rel. Utilities Comm. v. Public Staff**, 43.

The Utilities Commission did not abuse its discretion in declaring as policy, in the course of adjudicating a particular case, that 100% of the gain or loss on the sale of water/sewer utility systems should be assigned to the utility company shareholders. **State ex rel. Utilities Comm. v. Public Staff**, 623.

WORKERS' COMPENSATION**§ 9 (NCI4th). Failure to give notice of lapse of insurance**

A self-insurance fund and its servicing agent were not required to notify the principal contractor of cancellation of a subcontractor's workers' compensation insurance coverage where they had no knowledge of the certificate of insurance provided to the principal contractor on behalf of the subcontractor, and the subcontractor's injured employee was not entitled to compensation from the self-insurance fund where there was a proper cancellation of the subcontractor's compensation coverage by the servicing agent. **Patterson v. Markham & Associates**, 448.

§ 46 (NCI4th). "Statutory employer"; contractor's duty to remote employees

A general contractor's failure to obtain a certificate of workers' compensation insurance from plaintiff subcontractor, a sole proprietor, did not render the contractor liable under G.S. 97-19 for compensation for an injury suffered by plaintiff subcontractor himself. **Southerland v. B. V. Hedrick Gravel & Sand Co.**, 120.

A general contractor was not a statutory employer of a subcontractor's employee under G.S. 97-19 where an insurance agent sent the general contractor a certificate of insurance indicating coverage for the subcontractor for one year, and the general contractor was not notified when the subcontractor's insurance was canceled for its failure to pay its premium. **Patterson v. Markham & Associates**, 448.

§ 85 (NCI4th). Disbursement of proceeds of settlement; subrogation claim of insurance carrier

Although the Industrial Commission had jurisdiction to disburse third-party proceeds in this case, such jurisdiction did not extend over a motion to stay execution of a superior court order. **Hieb v. Howell's Child Care Center**, 61.

§ 86 (NCI4th). Liens upon payments made by third party

An employer who has paid workers' compensation benefits to its employee is entitled to a lien on UIM benefits received by the employee in an action against the tortfeasor, and it is unimportant whether the policy is purchased by the employee or by his spouse residing in the same household. **Creed v. R. G. Swaim and Son, Inc.**, 124.

The Industrial Commission erred in determining that defendant employer and defendant compensation carrier possessed no lien interest in sums received by plaintiff through settlement with the third-party tortfeasor prior to resolution of this workers' compensation claim. **Radzisz v. Harley Davidson of Metrolina**, 602.

§ 102 (NCI4th). Continuing jurisdiction of Industrial Commission

The Industrial Commission had continuing jurisdiction to order resumption and repayment of workers' compensation benefits after defendants stopped payment without proper approval where lifetime benefits had been awarded pursuant to a Form 26 agreement. **Hieb v. Howell's Child Care Center**, 61.

§ 114 (NCI4th). Employment as contributing proximate cause of injury

The evidence supported the Industrial Commission's conclusion that plaintiff's current condition was the result of an automobile accident in which she injured both shoulders and one arm rather than a job related injury to her right arm. **Carter v. Northern Telecom**, 547.

WORKERS' COMPENSATION—Continued**§ 141 (NCI4th). Injuries sustained while going to or returning from work generally**

An accident occurred in the course of plaintiffs' employment where plaintiffs were being transported out of defendant employer's maintenance garage area to an afterwork destination and the accident occurred on a road which provided the only ingress and egress to and from the plant area when plaintiff driver collided with a fork-lift left by defendant employee partially on the road. **Smallwood v. Eason**, 661.

§ 144 (NCI4th). Injury sustained while in, on way to, or from parking lots off employer's premises

Plaintiff's injury by accident from a hazardous condition on property adjacent to his employer's premises did not arise out of and in the course of employment even though the employer instructed plaintiff to use that route for ingress and egress. **Jennings v. Backyard Burgers of Asheville**, 129.

§ 219 (NCI4th). Medical bills to be approved by Industrial Commission; payment of medical expenses

The Industrial Commission had the authority to order defendants to pay a 10% penalty against all amounts past due and to pay costs where defendants terminated disability and medical compensation without the Commission's approval and refused to resume immediate payments following a deputy commissioner's order. **Hieb v. Howell's Child Care Center**, 61.

The Industrial Commission properly ordered that defendant pay for adding to plaintiff paraplegic's new home those accessories necessary to accommodate plaintiff's disabilities rather than that defendant pay for construction of the entire house or pay nothing for making the home accessible to plaintiff's handicap. **Timmons v. N.C. Dept. of Transportation**, 456.

§ 224 (NCI4th). Employee's right to select treating physician; approval of Industrial Commission

There was no error in the Industrial Commission's conclusion in a workers' compensation action that defendant is not liable for the treatment of plaintiff by a doctor because plaintiff did not seek authorization and because the treatments did not provide relief, effect a cure or lessen the period of disability. **Franklin v. Broyhill Furniture Industries**, 200.

§ 230 (NCI4th). Requirement of showing impairment of earning capacity; existence of disability

The Industrial Commission erred in awarding permanent total disability benefits to plaintiff where the hourly wage plaintiff received as a custodian was higher than what he earned in his pre-injury position as a chemical mixer, and plaintiff failed to show that his custodial position was "made work," but the case must be remanded for findings and conclusions on whether plaintiff is physically and mentally capable of performing his custodial duties. **Arrington v. Texfi Industries**, 476.

The Industrial Commission correctly denied defendant's motion to terminate plaintiff paraplegic's lifetime compensation benefits under G.S. 97-29 after plaintiff returned to full-time employment. **Timmons v. N.C. Dept. of Transportation**, 456.

§ 254 (NCI4th). When temporary total disability period ends

The Industrial Commission improperly awarded plaintiff in a workers' compensation case temporary total disability after the date on which the Commission deter-

WORKERS' COMPENSATION—Continued

mined that plaintiff reached maximum medical improvement. **Franklin v. Broyhill Furniture Industries**, 200.

§ 256 (NCI4th). Determination of total permanent disability in particular cases

The Industrial Commission erred in a worker's compensation action by implicitly determining that plaintiff is not entitled to any disability under G.S. 97-29 after concluding that plaintiff could not recover permanent partial disability under G.S. 97-31. **Franklin v. Broyhill Furniture Industries**, 200.

§ 260 (NCI4th). Calculation of average weekly wages, generally

The Industrial Commission did not err in failing to include vehicle lease payments received from plaintiff's employer in calculating her average weekly wages. **Greenman v. Pony Express**, 136.

§ 261 (NCI4th). Average weekly wages; employment prior to injury of less than 52 weeks

The Industrial Commission did not err in determining compensation in a workers' compensation action by using plaintiff's 1994 wages to the time of injury rather than the wages received from March 1993 to March 1994. **Craft v. Bill Clark Construction Co.**, 777.

§ 263 (NCI4th). Average weekly wages; approximation of average weekly wage under exceptional circumstances

The Industrial Commission did not err in a workers' compensation action in its computation of plaintiff's wages by not deducting expenses incurred in earning those wages. **Craft v. Bill Clark Construction Co.**, 777.

§ 296 (NCI4th). Employee's conduct as bar to compensation; refusal of medical treatment

When a claimant defends failure to accept treatment by denial of the ability to make rational decisions, the Industrial Commission must make findings regarding claimant's ability to act as a reasonable person in making treatment decisions before denying benefits under G.S. 97-25. **Johnson v. Jones Group, Inc.**, 219.

§ 297 (NCI4th). Refusal to accept suitable employment

Where an employee who has sustained a compensable injury has been provided light duty or rehabilitative employment, termination from such employment for misconduct unrelated to the compensable injury does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving temporary partial or total disability benefits. **Seagroves v. Austin Co. of Greensboro**, 228.

§ 372 (NCI4th). Discovery; depositions and production of records

The Industrial Commission erred by denying plaintiff's motion for an order prohibiting the ex parte contact between defense counsel and plaintiff's treating physician, and deposition testimony of the physician should have been excluded. **Evans v. Young-Hinkle Corp.**, 693.

§ 399 (NCI4th). Scope of Industrial Commission's duty to resolve dispute generally

The Industrial Commission's findings of fact showed that the Commission impermissibly disregarded the testimony of plaintiff's coworkers which corroborated plain-

WORKERS' COMPENSATION—Continued

tiff's testimony that he had suffered an injury to his back, and the case is remanded to the Commission for it to consider all of the evidence and make complete findings and proper conclusions. **Weaver v. American National Can Corp.**, 507.

The Industrial Commission did not err in referring to mediation any disputes which may arise with respect to the costs and building of a home contemplated by plaintiff paraplegic. **Timmons v. N.C. Dept. of Transportation**, 456.

§ 401 (NCI4th). Industrial Commission's duty to make findings of fact

Where the Industrial Commission's opinion and award did not contain findings or conclusions regarding plaintiff's entitlement to temporary total disability, the case is remanded for further proceedings to determine if plaintiff is entitled to such benefits. **Setzer v. Boise Cascade Corp.**, 441.

§ 452 (NCI4th). Review of Industrial Commission's findings of fact and conclusions of law generally

Defendants failed to state a legal basis upon which the appellate court could properly review the Industrial Commission's findings where they confused the civil standard of proof, "by the greater weight of the evidence," with the standard applied to review of opinions arising from the Commission, "by any competent evidence." **Adams v. Kelly Springfield Tire Co.**, 681.

§ 453 (NCI4th). Conclusiveness of Industrial Commission's findings of fact

There was competent evidence to support the Industrial Commission's findings in a workers' compensation case and those findings are binding on appeal. **Franklin v. Broyhill Furniture Industries**, 200.

§ 471 (NCI4th). Industrial Commission's authority to assess costs and attorney's fees against parties

The Industrial Commission properly ordered defendant to pay plaintiff's attorney fees where defendant appealed an award in favor of plaintiff to the full Commission which affirmed the award, and the Commission could properly tax as costs the fees of plaintiff's rehabilitation expert for her deposition testimony but not for the preparation of a "life care plan" for plaintiff. **Timmons v. N.C. Dept. of Transportation**, 456.

The Industrial Commission erred in ordering that defendant's costs and attorney's fees be paid by plaintiff's counsel since costs may not be assessed against counsel, and plaintiff's claim was not prosecuted without reasonable ground. **Evans v. Young-Hinkle Corp.**, 693.

§ 476 (NCI4th). Award of costs and attorney's fees for hearing brought without reasonable ground

The Industrial Commission had the authority to order defendants to pay costs, including attorney's fees, where the Commission found that defendants terminated disability and medical compensation without the Commission's approval and refused to resume immediate payments following a deputy commissioner's order, and the Commission concluded that defendants brought this claim without reasonable grounds. **Hieb v. Howell's Child Care Center**, 61.

ZONING**§ 48 (NCI4th). Change of ownership or tenancy of nonconforming use**

The trial court properly determined that a building used by a church for meetings, classes, retreats, and dinners had not been used as a church but was used in a manner deemed nonconforming under the zoning ordinance so that petitioners could continue such use after their purchase of the building, but the nonconforming use could not be expanded. **Hayes v. Fowler**, 400.

§ 50 (NCI4th). Nonconforming uses; accessory or incidental uses of property zoned for other uses

The trial court properly held that the use of property as a bed and breakfast did not constitute an “accessory use” as permitted by a zoning ordinance. **Hayes v. Fowler**, 400.

§ 71 (NCI4th). Sufficiency of findings to support denial of special permit

The decision by respondent board of adjustment to deny petitioners a permit to operate a bed and breakfast was not arbitrary and capricious. **Hayes v. Fowler**, 400.

WORD AND PHRASE INDEX

ABANDONMENT

Constructive abandonment by acts of cruelty, **State v. Talbot**, 698.

Events before domestic violence order, **State v. Talbot**, 698.

ABORTION PICKETS

RICO action, **Kaplan v. Prolife Action League of Greensboro**, 720.

ACCOUNT

Letter not promise to pay for customer, **Carolina Cable & Connector v. R&E Electronics, Inc.**, 519.

ACCOUNTANTS

Reliance on unaudited statements prepared by, **Liberty Finance Co. v. BDO Seidman**, 515.

ACTING IN CONCERT

Instructions, **State v. Weaver**, 276.

ADVERSE POSSESSION

Mistake, **Enzor v. Minton**, 268.

AFFIDAVIT

Improper admission as business record, **State v. Sisk**, 361.

AIRPORT

Investigatory stop and frisk, **State v. Artis**, 114.

AMENDMENT OF COMPLAINT

Addition of party, **Denning-Boyles v. WCES, Inc.**, 409.

ANSWER

Belated answer to amended complaint, **Sykes v. Keiltex Industries, Inc.**, 482.

ANTITRUST LAWS

Standing of indirect purchasers to sue, **MacLagan v. Klein**, 557.

APPEAL

Action remanded to agency for hearing, **Byers v. N.C. Savings Institutions Division**, 689.

Order requiring disclosure of documents, **Kaplan v. Prolife Action League of Greensboro**, 677.

APPRAISAL REPORT

Signed only by umpire, **Enzor v. N.C. Farm Bureau Mut. Ins. Co.**, 544.

ARBITRATION

Attorney fees, **Lucas v. City of Charlotte**, 140.

Failure of arbitrator to disclose relationships, **William C. Vick Construction Co. v. N. C. Farm Bureau Federation**, 97.

ARGUMENT OF COUNSEL

Reference to unadmitted checks, **State v. Sisk**, 361.

ARTICLES OF INCORPORATION

Provision conditioning shareholder's votes, **Byrd v. Raleigh Golf Assn.**, 272.

ATTORNEY FEES

Services prior to arbitration, **Lucas v. City of Charlotte**, 140.

ATTORNEY GENERAL

Role in URESA action, **Sotelo v. Drew**, 464.

AUTOMOBILE INSURANCE

Close connections rule for fleet policy, **Martin v. Continental Ins. Co.**, 650.

Family member exclusion, **Cartner v. Nationwide Mutual Fire Ins. Co.**, 251.

Husband and unlisted car not covered, **Owens v. Chance**, 523.

Liability coverage where policy procured by fraud, **Hartford Underwriters Ins. Co. v. Becks**, 489.

Motorcycle operated in employer's business, **Vasseur v. St. Pauls Mutual Ins. Co.**, 418.

Waiver of UIM subrogation rights, **Daughtry v. Castleberry**, 671.

BABY FORMULA

Standing of indirect purchasers to bring antitrust action, **MacLagan v. Klein**, 557.

BANKRUPTCY

Effect on equitable distribution action, **Justice v. Justice**, 733.

BED AND BREAKFAST

Denial of permit, **Hayes v. Fowler**, 400.

BILLBOARDS

Regulation of nonconforming signs in noncommercial/nonindustrial areas, **Outdoor East v. Harrelson**, 685.

BLOOD GROUPING TESTS

Married woman's lover, **Guilford County ex rel. Gardner v. Davis**, 527.

BLOOD SAMPLE

Chain of custody, **State v. Hairston**, 753.

BOAT

Operating while intoxicated, **State v. Hudson**, 336.

BOND

Ex parte setting, **State v. Hunt**, 762.

BUILDING INSPECTOR

Negligence of, **Moseley v. L & L Construction, Inc.**, 79.

BURGLARY

Evidence sufficient, **State v. Myers**, 189.

BUSINESS RECORDS

Affidavit improperly admitted, **State v. Sisk**, 361.

CARMACK AMENDMENT

Applicability to action against carrier, **Rahim v. Truck Air of the Carolinas**, 609.

CHILD CUSTODY

Jurisdiction where Kentucky is home state, **Beck v. Beck**, 629.

Jurisdiction where North Carolina is home state, **Beck v. Beck**, 629.

Stress from religion conflict as change of circumstances, **MacLagan v. Klein**, 557.

Unfitness of custodial parent not required for modification, **MacLagan v. Klein**, 557.

CHILD SUPPORT

Escalation clause in foreign order void, **Kelly v. Otte**, 585.

New Jersey law applicable, **Kelly v. Otte**, 585.

Time for pleading statute of limitations in arrears action, **Kelly v. Otte**, 585.

CLAIM AND DELIVERY

Motion for damages after voluntary dismissal, **Walker Frames v. Shively**, 643.

CLOSE CONNECTIONS RULE

Fleet policy, **Martin v. Continental Ins. Co.**, 650.

CLOSING ARGUMENT

See Argument of Counsel this index.

COLLATERAL ESTOPPEL

Paternity action not barred by, **Guilford County ex rel Gardner v. Davis**, 527.

COMMISSION FOR HEALTH SERVICES

Exercise of rulemaking power, **Act-Up Triangle v. Commission for Health Services**, 256.

COMMON CARRIER

Liability for accident of leased tractor, **Parker v. Erixon**, 383.

CONDUCT WHILE IN CUSTODY

Admissible, **State v. Myers**, 189.

CONFLICT OF LAWS

Open account for pharmaceuticals, **J. M. Smith Corp. v. Matthews**, 771.

CONTAMINATED SOIL AND WATER

Tax value, **In re Appeal of Camel City Laundry Co.**, 210.

CONTEMPORARY COMMUNITY STANDARDS

Evidence of, **State v. Johnston**, 292.

CONTRIBUTORY NEGLIGENCE

Forklift accident, **Conner v. Continental Industrial Chemicals**, 70.

CONTROLLED SUBSTANCE TAX

Subsequent drug conviction not double jeopardy, **State v. Creason**, 495.

CPA

Reliance on unaudited statements prepared by, **Liberty Finance Co. v. BDO Seidman**, 515.

DAMAGES

Failure to work when capable, **Conner v. Continental Industrial Chemicals**, 70.

Jury verdict of \$1.00 insufficient, **Anderson v. Hollifield**, 426.

DEED OF TRUST

Failure of consideration, **In re Foreclosure of Aal-Anubiainhotepokorohamz**, 133.

Release of tract from, **In re Foreclosure of C and M Investments**, 52.

DEFAULT JUDGMENT

Answer before entry of default, **Moore v. Sullivan**, 647.

Failure to answer interrogatories, **Moore v. Sullivan**, 647.

DISCOVERY

Default for failure to answer interrogatories, **Moore v. Sullivan**, 647.

Order requiring disclosure of documents not appealable, **Kaplan v. Prolife Action League of Greensboro**, 677.

Request for statement of monetary relief sought, **Cottle v. Thompson**, 147.

Sanctions not imposed, **State v. Sisk**, 361.

DNA ANALYST

Qualification as expert, **State v. Hairston**, 753.

DOCTOR

Expert opinion as to cocaine impairment, **Conner v. Continental Industrial Chemicals**, 70.

DOUBLE JEOPARDY

Drug conviction after controlled substance tax assessed, **State v. Ballenger**, 179; **State v. Creason**, 495.

Two habitual felon adjudications, **State v. Creason**, 495.

DRUG TEST

As business record, **Conner v. Continental Industrial Chemicals**, 70.

DUE PROCESS

Tax foreclosure, **Onslow County v. Phillips**, 317.

DURESS

Note secured by threat of prosecution, **Hinson v. United Financial Services**, 469.

EASEMENT

Permissible use and identity, **Boger v. Gatton**, 635.

EFFECTIVE ASSISTANCE OF COUNSEL

Termination of parental rights, **In re Oghenekevebe**, 434.

EQUITABLE DISTRIBUTION

Prior discharge in bankruptcy, **Justice v. Justice**, 733.

ERISA CLAIM

Pleadings, **Freeman v. Blue Cross and Blue Shield of North Carolina**, 260.

EX PARTE COMMUNICATIONS

Treating physician in workers' compensation case, **Evans v. Young-Hinkle Corp.**, 693.

FILED RATE DOCTRINE

Adopted, **N.C. Steel v. National Council on Compensation Ins.**, 163.

FLEET POLICY

Close connections rule, **Martin v. Continental Ins. Co.**, 650.

Rejection of UIM coverage, **Martin v. Continental Ins. Co.**, 650.

FORGERY

Indictment altered, **State v. Sisk**, 361.

FORKLIFT ACCIDENT

Sudden emergency, **Conner v. Continental Industrial Chemicals**, 70.

FORMER JEOPARDY

See Double Jeopardy this index.

GAME ROOM

Stop and frisk, **State v. Artis**, 114.

HABITUAL FELON

Attack on original conviction not permitted, **State v. Creason**, 495.

Judgment arrested on underlying felonies, **State v. Davis**, 240.

Prior record level not based on same convictions, **State v. Misenheimer**, 156.

Separate conviction in same week for prior record level, **State v. Truesdale**, 639.

Two adjudications not double jeopardy, **State v. Creason**, 495.

HEALTH DEPARTMENT

Negligence action against, **Carter v. Stanly County**, 235.

HIT-AND-RUN

Failure to show negligence by driver, **Powell v. Doe**, 392.

HIV TESTING

Anonymous, **Act-Up Triangle v. Commission for Health Services**, 256.

HOMEOWNERS ASSOCIATION

Real party in interest, **Richland Run Homeowners Assn. v. CHC Durham Corp.**, 345.

HOMEOWNERS INSURANCE

Applicability of motor vehicle exclusion, **Nationwide Mutual Ins. Co. v. Integon Indemnity Corp.**, 536.

ILLEGITIMATE CHILDREN

Intestate succession, **In re Estate of Morris**, 264.

IMPAIRED DRIVING

Highway Patrol checking station, **State v. Barnes**, 144.

INDICTMENT

No fatal variance from proof, **State v. Weaver**, 276.

INSANITY

Testimony of substance abuse counselor and clinical social worker, **State v. Myers**, 189.

INSURANCE COMPANIES

Slow payment, **Murray v. Nationwide Mutual Ins. Co.**, 1.

INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

Breaking into house and installing hidden video camera, **Miller v. Brooks**, 20.

Sexual comments and advances, **Denning-Boyles v. WCES, Inc.**, 409.

Tax foreclosure, **Onslow County v. Phillips**, 317.

INTERLOCUTORY APPEAL

Derivative liability, **Long v. Giles**, 150.

INTERSTATE CARRIER

Claim for rugs stolen from, **Rahim v. Truck Air of the Carolinas**, 609.

Liability for leased tractor accident, **Parker v. Erixon**, 383.

INTESTATE SUCCESSION

Illegitimate children, **In re Estate of Morris**, 264.

INVASION OF PRIVACY

Hidden video camera and intercepting mail, **Miller v. Brooks**, 20.

INVOLUNTARY MANSLAUGHTER

Operating boat while intoxicated, **State v. Hudson**, 336.

JUDGMENT

Ambiguous, **Murray v. Nationwide Mutual Ins. Co.**, 1.

KIDNAPPING

Victim moved as part of another felony, **State v. Weaver**, 276.

LEASED TRACTOR

Carrier not liable for accident, **Parker v. Erixon**, 383.

LEGISLATIVE POWER

Delegation of, **Town of Spruce Pine v. Avery County**, 704.

LIABILITY INSURANCE

Inadmissible in personal injury action, **Anderson v. Hollifield**, 426.

LOAN PROCEEDS

Duty to monitor use of, **Carlson v. Branch Banking and Trust Co.**, 306.

LOCAL GOVERNMENT**RISK POOL**

Total waiver of immunity, **Cross v. Residential Support Services**, 616.

MARIJUANA

Tax assessment on, **State v. Ballenger**, 179; **State v. Creason**, 495.

MARITAL RELATION

Resumption of, **Fletcher v. Fletcher**, 744.

MEDIATION

Future disputes in workers' compensation case, **Timmons v. N.C. Dept. of Transportation**, 456.

MONETARY RELIEF SOUGHT

Request for statement of, **Cottle v. Thompson**, 147.

MOTION TO SUPPRESS

Failure to file affidavit, **State v. Creason**, 495.

NOTE

Sale of insurance business, **Stanley & Associates v. Risk and Ins. Brokerage Corp.**, 532.

NOTICE OF APPEAL

Amendment of judgment, **State v. Davis**, 240.

OBJECTION

Grounds not apparent from context, **State v. Hairston**, 753.

OBSCENITY

Contemporary community standards, **State v. Johnston**, 292.

Definition of prurient, **State v. Johnston**, 292.

OBSCENITY—Continued

Jury instructions on two magazines, **State v. Johnston**, 292.

Knowledge of contents, **State v. Johnston**, 292.

PHARMACEUTICALS

Open account, **J. M. Smith Corp. v. Matthews**, 771.

PAROL TRUST

Engrafting of, **Burton v. Burton**, 153.

PATERNITY

Blood tests for married woman's lover, **Guilford County ex rel. Gardner v. Davis**, 527.

PHOTO PROCESSING EQUIPMENT

Deed of trust, **In re Foreclosure of Aal-Anubiaimhotepokorohamz**, 133.

PRESCRIPTIVE EASEMENT

Permissible use and identity of easement, **Boger v. Gatton**, 635.

PRIOR RECORD LEVEL

Separate convictions in same week for habitual felon status, **State v. Truesdale**, 639.

PROBATION

Condition in pornography case, **State v. Johnston**, 292.

PROMISSORY NOTE

Sale of insurance business, **Stanley & Associates v. Risk and Ins. Brokerage Corp.**, 532.

PROPER LOOKOUT

Striking of child, **Manley v. Parker**, 540.

PSYCHIATRIC RECORDS

Disclosure not required, **State v. Sisk**, 361.

PUBLIC HOUSING

Eviction for crime by uninvited son, **Charlotte Housing Authority v. Fleming**, 511.

PUNITIVE DAMAGES

Invasion of privacy by intrusion, **Miller v. Brooks**, 20.

RECORD ON APPEAL

Failure to include agreement for compensation, **Crouse v. Flowers Baking Co.**, 555.

RELEASE

Employer as third-party beneficiary of, **Sykes v. Keiltex Industries, Inc.**, 482.

RELIGIOUS TRAINING

Father granted charge of, **MacLagan v. Klein**, 557.

RICO

Anti-abortion pickets, **Kaplan v. Prolife Action League of Greensboro**, 720.

RUGS

Action against interstate carrier, **Rahim v. Truck Air of the Carolinas**, 609.

SANCTIONS

Failure to make discovery, **State v. Sisk**, 361.

SANITARIAN

Negligence action against, **Carter v. Stanly County**, 235.

SECOND-DEGREE MURDER

Defendant as perpetrator, **State v. Davidson**, 326.

SEDIMENTATION POLLUTION CONTROL ACT

Notice of violation, **Midway Grading Co. v. N.C. Dept. of E.H.N.R.**, 501.

When filing of soil erosion plan required, **Midway Grading Co. v. N.C. Dept. of E.H.N.R.**, 501.

SEPARATION AGREEMENT

Rescission for reconciliation, **Fletcher v. Fletcher**, 744.

SEROLOGIST

Qualification as expert, **State v. Hairston**, 753.

SEXUAL HARASSMENT

Intentional infliction of emotional distress, **Denning-Boyles v. WCES, Inc.**, 409.

Sexual comments and advances, **Denning-Boyles v. WCES, Inc.**, 409.

SHAREHOLDERS

Right to vote, **Byrd v. Raleigh Golf Assn.**, 272.

SIDEWALK

No duty on abutting landowner to maintain, **Williams v. City of Durham**, 595.

SOVEREIGN IMMUNITY

Insurance purchase by area authority not waiver by county, **Cross v. Residential Support Services**, 616.

Waiver by participation in local government risk pool, **Cross v. Residential Support Services**, 616.

STATE EMPLOYEE

Six-month worker, **Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.**, 246.

STATUTE OF LIMITATIONS

Note secured by threat of prosecution, **Hinson v. United Financial Services**, 469.

STATUTE OF REPOSE

Failure to plead, **Richland Run Homeowners Assn. v. CHC Durham Corp.**, 345.

STRIKING CHILD

No failure to keep proper lookout, **Manley v. Parker**, 540.

SUBROGATION

Waiver by UIM carrier, **Daughtry v. Castleberry**, 671.

SUDDEN EMERGENCY

Hydroplaning on wet road, **Allen v. Efird**, 701.

SUMMARY JUDGMENT

Amendment to allege release not allowed, **Sykes v. Keiltex Industries, Inc.**, 482.

Verified allegations of complaint, **Murray v. Nationwide Mutual Ins. Co.**, 1.

SWEET POTATOES

Appraisal report signed by umpire, **Enzor v. N.C. Farm Bureau Mut. Ins. Co.**, 544.

Value of potatoes destroyed by fire, **Enzor v. N.C. Farm Bureau Mut. Ins. Co.**, 544.

TAX ASSESSMENT

Marijuana, **State v. Ballenger**, 179;
State v. Creason, 495.

TAX FORECLOSURE

Attorney's fees, **Onslow County v. Phillips**, 317.

TAXATION

Contaminated property, **In re Appeal of Camel City Laundry Co.**, 210.

Valuation of property, **In re Appeal of Parsons**, 32.

TEACHER

Dismissal for immorality, **Barringer v. Caldwell County Bd. of Educ.**, 373.

**TERMINATION OF
PARENTAL RIGHTS**

Effective assistance of counsel, **In re Oghenekevebe**, 434.

Leaving child in foster care, **In re Oghenekevebe**, 434.

Unilateral declaration of termination by natural parents, **In re Jurga**, 91.

TRESPASS

Installing video camera, **Miller v. Brooks**, 20.

UNANIMOUS JURY VERDICT

Instruction on two magazines, **State v. Johnston**, 292.

**UNDERINSURED MOTORIST
COVERAGE**

Carrier's waiver of subrogation rights, **Daughtry v. Castleberry**, 671.

Motorcycle operated in employer's business, **Vasseur v. St. Pauls Mutual Ins. Co.**, 418.

Named insured and listed driver not synonymous, **Nationwide Mutual Ins. Co. v. Williams**, 103.

UNDERINSURED MOTORIST COVERAGE—Continued

- Policyholder fraud in procuring policy, **Hartford Underwriters Ins. Co. v. Becks**, 489.
- Rejection for fleet policy, **Martin v. Continental Ins. Co.**, 650.
- Rejection requirements not met, **Vasseur v. St. Pauls Mutual Ins. Co.**, 418.
- Workers' compensation lien, **Creed v. R. G. Swaim and Son, Inc.**, 124.

UNFAIR TRADE PRACTICE

- Alteration of original interest rates on notes, **Britt v. Jones**, 108.
- Loan, **Carlson v. Branch Banking and Trust Co.**, 306.
- Payment of insurance claim, **Murray v. Nationwide Mutual Ins. Co.**, 1.
- Standing of indirect purchasers to sue, **MacLagan v. Klein**, 557.

UNINSURED MOTORIST COVERAGE

- Hit-and-run driver, **Powell v. Doe**, 392.

UNJUST ENRICHMENT

- Note procured by threat of criminal prosecution, **Hinson v. United Financial Services**, 469.

URESA ACTION

- Improper motion by Attorney General, **Sotelo v. Drew**, 464.

USURY

- Evidence sufficient, **Britt v. Jones**, 108.

UTILITY

- Sale of private, **State ex rel. Utilities Comm. v. Public Staff**, 43.

UTTERING FORGED CHECK

- Indictment altered, **State v. Sisk**, 361.

UTTERING FORGED CHECK— Continued

- Other checks showing knowledge, **State v. Sisk**, 361.

VOLUNTARY DISMISSAL

- Claim for damages by subsequent motion, **Walker Frames v. Shively**, 643.
- Period to refile after statement in open court, **Baker v. Becan**, 551.

WATER SUPPLY WATERSHED PROTECTION ACT

- Delegation of legislative power, **Town of Spruce Pine v. Avery County**, 704.

WORKERS' COMPENSATION

- Absence of findings on temporary total disability, **Setzer v. Boise Cascade Corp.**, 441.
- Attorney fees award improper, **Evans v. Young-Hinkle Corp.**, 693.
- Cancellation of subcontractor's insurance, **Patterson v. Markham & Associates**, 448.
- Contractor not subcontractor's statutory employer, **Patterson v. Markham & Associates**, 448.
- Costs and attorney fees assessed against counsel, **Evans v. Young-Hinkle Corp.**, 693.
- Coworker testimony improperly disregarded, **Weaver v. American National Can Corp.**, 507.
- Current condition not related to compensable back injury, **Carter v. Northern Telecom**, 547.
- Disability, **Franklin v. Broyhill Furniture Industries**, 200.
- Evidence in personal injury action, **Anderson v. Hollifield**, 426.
- Ex parte communication with plaintiff's treating physician, **Evans v. Young-Hinkle Corp.**, 693.
- Expenses not deducted from wages, **Craft v. Bill Clark Construction Co.**, 777.

WORKERS' COMPENSATION—
Continued

- Expenses to make home accessible, **Timmons v. N.C. Dept. of Transportation**, 456.
- Future disputes ordered to mediation, **Timmons v. N.C. Dept. of Transportation**, 456.
- Hazardous ingress and egress, **Jennings v. Backyard Burgers of Asheville**, 129.
- Injuries while on way to after work destination, **Smallwood v. Eason**, 661.
- Insufficient findings for total disability, **Arrington v. Texfi Industries**, 476.
- Liability of contractor for subcontractor injury, **Southerland v. B. V. Hedrick Gravel & Sand Co.**, 120.
- Lien on UIM benefits, **Creed v. R. G. Swaim and Son, Inc.**, 124.
- Medical rehabilitation expert's fees, **Timmons v. N.C. Dept. of Transportation**, 456.
- Paraplegic's return to work does not end benefits, **Timmons v. N.C. Dept. of Transportation**, 456.
- Payments stopped without proper approval, **Hieb v. Howell's Child Care Center**, 61.
- Reimbursement of employer after settlement with tortfeasor, **Radzisz v. Harley Davidson of Metrolina**, 602.

WORKERS' COMPENSATION—
Continued

- Standard of proof, **Adams v. Kelly Springfield Tire Co.**, 681.
- Temporary total disability based on inability to earn same wages, **Adams v. Kelly Springfield Tire Co.**, 681.
- Terminated for unrelated misconduct, **Seagroves v. Austin Co. of Greensboro**, 228.
- Third-party proceeds, **Hieb v. Howell's Child Care Center**, 61.
- Treatment by unauthorized physician, **Franklin v. Broyhill Furniture Industries**, 200.
- Treatment decisions, **Johnson v. Jones Group, Inc.**, 219.
- Unfair competition, **N.C. Steel v. National Council on Compensation Ins.**, 163.
- Vehicle lease payments, **Greenman v. Pony Express**, 136.
- Wages for less than 52 weeks, **Craft v. Bill Clark Construction Co.**, 777.

ZONING

- Denial of permit for bed and breakfast, **Hayes v. Fowler**, 400.
- Nonconforming use of church property, **Hayes v. Fowler**, 400.

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